No.

In the Supreme Court of the United States

JAWDAT ELIA,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MARISA C. PETRELLA
Co-Counsel
PETRELLA & ASSOCIATES, P.C.
26211 CENTRAL PARK BLVD.
SUITE 302
SOUTHFIELD, MI 48076
(248) 223-9880

JOHN P. JACOBS
Counsel of Record
SUITE 600
THE DIME BUILDING
719 GRISWOLD STREET
P.O. BOX 33600
DETROIT, MI 48232-5600
(313) 965-1900

Attorneys for the Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Sixth Circuit erred and is in conflict with the United States Court of Appeals for the Seventh Circuit in finding that there was no denial of procedural due process in the Immigration and Naturalization Service's delay of approximately five (5) years in conducting a hearing in Petitioner's case and, further, that the delay was not fundamentally unfair even though an intervening change in the law deprived Petitioner of any eligibility for discretionary relief.

2. Whether the United States Court of Appeals for the Sixth Circuit erred in its decision and whether this decision is in conflict with various District Courts of the Second Circuit in a § 212(c) waiver case in defining the phrase, "term of imprisonment," as the time actually served by Petitioner, when, in reality, that five (5)-year sentence, even as served by Petitioner, was ultimately later substantially reduced to a minimum sentence of only two (2) years, as finally imposed by the state criminal courts.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Jawdat "Joe" Elia, an individual.

Respondent is Alberto Gonzales, Attorney General of the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, Rules and Regulations

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jawdat "Joe" Elia, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in a decision which refused to vacate his deportation to Iraq.

CITATIONS OF OPINIONS AND ORDERS

The first published opinion of the Court of Appeals for the Sixth Circuit in *Jawdat Elia v. Alberto Gonzales, Attorney General,* 418 F.3d 667 (6th Cir. 2005), decided and filed on July 22, 2005 is reprinted in the Appendix at pp. 20a – 34a.

The published amended opinion of the Court of Appeals for the Sixth Circuit in *Jawdat Elia v. Alberto Gonzales, Attorney General,* 2005 WL 3304600 (6th Cir. Oct. 24, 2005), decided and filed on October 24, 2005, is reprinted in the Appendix at pp. 1a – 15a.

The unpublished order of Board of Immigration Appeals is reprinted in the Appendix at p. 37a.

The unpublished Oral Decision of the Immigration Court is reprinted in the Appendix at pp. 38a – 45a.

BASIS FOR JURISDICTION IN THIS COURT

The United States Court of Appeals for the Sixth Circuit filed its amended Judgment and Opinion on October 24, 2005, and entered an order denying Petitioner's timely petition for rehearing on September 29, 2005.

This petition for writ of certiorari is timely filed within ninety (90) days of the date of the Court of Appeals' denial of

Petitioner's properly filed petition for panel rehearing. 28 U.S.C. § 2101 (c). *See also* Revised Supreme Court Rule 13.3.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Sixth Circuit's decision on a writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution, Amendment V:

No person shall be...deprived of life, liberty, or property, without due process of law...

8 C.F.R. § 1212.3:

(a) ...An application by an eligible alien for the exercise of discretion under former section 212(c) of the Act (as in effect prior to April 1997)...shall be submitted to the immigration judge by filing...Application for Advance Permission to Return to Unrelinquished Domicile.

(f) ...An application for relief under former section 212(c) of the Act shall be denied if:

(4) The alien has been charged and found to be deportable and removable on the basis of a crime that is an aggravated relony...except as follows:

(i) An alien whose convictions for one or more aggravated felonies were entered pursuant to plea agreements made on or after November 29, 1990, but prior to April 24, 1996, is ineligible for section 212(c) relief only if he or she has served a

term of imprisonment of five years or more for such aggravated felony or felonies, and

(ii) An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990...

8 U.S.C. § 1252(a)(2)(C):

(C) Orders against criminal aliens:

Notwithstanding any other provision of law... no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense...

The REAL ID Act, Public Law 109-13, § 106:

(a) Section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252) is amended--

in subsection (a)--

(A) in paragraph (2)--

(iii) by adding at the end the following:

(D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS—Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions

> of law raised upon a petition for review filed with an appropriate Court of Appeals in accordance with this section...

STATEMENT OF THE CASE

Presented here is a tale that we believe is oft repeated in our Immigration System. When the INS inexplicably delays hearings for five (5) years or so, the law may undergo a sea change in the interim and the hapless, i.e. aliens suffering patiently in the Immigration System, endure the consequences. Also presented here is the equally sad tale of immigration petitioners whose criminal sentences have been vacated, reversed, suspended or reduced but who nevertheless fall prey to the inelastic rubber stamp of the INS, due process considerations notwithstanding.

Petitioner is an "aggravated felon" who is now subject to deportation to Iraq from the United States. He filed a petition for waiver of deportability before the Immigration Court, entitled "Application for Advance Permission to Return to Unrelinquished Domicile." Such relief is discretionary and is commonly known by the shorthand phrase "§ 212(c) waiver." Petitioner contends that he would be the ideal candidate for a grant of such relief.

Petitioner came to the United States with his Chaldean Christian family from Iraq at the age of four (4), and he became a Legal Permanent Resident. He is the second youngest of eight siblings. His mother and deceased father became American citizens, as did his older siblings. Petitioner also has a teenage daughter who was born here.

Petitioner was educated in the United States. While in high school, he was influenced by a bad crowd that led to his

criminal activity. On April 5, 1988, at age eighteen (18), Petitioner was arrested on drug charges. On June 28, 1991,[1] he pled guilty to delivery of a controlled substance in violation of Mich.Comp Laws §333.7401(2)(a)(iii).[2]

Petitioner's overall record in prison points to a man who radically changed his life for the better. He earned his GED while incarcerated, and went on to complete paralegal school in 1994. While in prison, he also studied financial markets. Upon his release, he has taken courses in business.

His parole eligibility report indicated that he worked gainfully as a carpenter, a painter and later became a porter at the prison administration building. His supervisor stated Petitioner "works hard, stays busy, and needs little or no supervision." A Michigan Department of Corrections Investigative Report states: "All reports on the defendant indicate he was a model prisoner who got along well with other inmates and correctional officers." Currently, Petitioner is employed and has started his own successful business.

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[1] Notably, Petitioner was arrested in 1988 but was not sentenced until 1991, three (3) years later. This lapse of time proved significant for Petitioner, as his guilty plea qualified him to apply for § 212(c) waiver in that he originally understood he was to receive a mere two (2)-year minimum sentence. Had Petitioner been sentenced prior to 1990, Petitioner's eligibility for § 212(c) waiver would not be at issue today because applicants who entered into plea agreements prior to November 29, 1990 remained eligible for § 212(c) waiver regardless of the length of the sentence served. *See* 8 C.F.R. § 1212.3(f)(4)(ii).

[2] The original judgment incorrectly stated that Petitioner pled guilty to possession of a controlled substance.

Despite these facts in Petitioner's favor, the Immigration Judge (IJ) was limited as the IJ could only review Petitioner's threshold eligibility for § 212(c) waiver[3] and consequently found on October 17, 2001 that Petitioner was ineligible for § 212(c) waiver as a threshold matter because he had served five (5) years in prison for his offense. A § 212(c) waiver is only available to those who have served less than a five (5)-year term of imprisonment. Petitioner admits that he was physically in prison for five (5) years but asserts that he should only lawfully have served two (2) years as his sentence was ultimately legally reduced to a two (2)-year minimum (*see infra*). The only reason he served five (5) years was that Michigan law was unsettled at the time with regard to whether criminal trial judges could vary a mandatory minimum criminal sentence downward given post-arrest behavior by a felon.

Petitioner was initially sentenced to a prison term of two (2) to twenty (20) years because of his remarkably good post-arrest behavior. The criminal trial judge noted Petitioner was only eighteen (18) years old at the time of the crime and had no prior arrest record. The judge found Petitioner had been motivated to change his life, as he had married his girlfriend and had accepted responsibility for their child. He had stayed out of trouble during the three (3) years from the date of his arrest to the date of his sentencing. Mr. Elia was working to

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[3] On October 25, 1996, Petitioner was initially denied § 212(c) waiver by the IJ because the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") eliminated that relief and applied retroactively to convictions before AEDPA's effective date. The Board of Immigration Appeals ("BIA") initially affirmed the IJ. Petitioner moved to reopen the case and the BIA reopened the case based upon *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999) which prohibited retroactive application of AEDPA.

support his family. The trial judge showed Petitioner mercy for the error he had committed as a youth, since he showed maturity and rehabilitation for the three (3) years before his sentencing.

On appeal by the prosecutor, the Michigan Court of Appeals reversed the trial court and imposed the statutory mandatory minimum sentence of five (5) to twenty (20) years in prison against Petitioner.[4] While the Court of Appeals found the post-arrest actions of Petitioner commendable, those actions did not convince the Court that substantial and compelling reasons existed to depart from the mandatory minimum sentences imposed by the Legislature and to be followed by the trial court judge.

Subsequently, however, the Michigan Supreme Court decided *People v. Fields*, 448 Mich. 58, 528 N.W.2d 176 (1995), holding that a criminal trial judge may vary downward from the mandatory minimum sentence based on objective and verifiable factors. The language in *Fields* mirrors the objective and verifiable factors considered in Petitioner's case:

> [T]he trial judge also listed several factors that are appropriate under the standard that we announce today, including the defendant's age, his solid work record, and the fact that the defendant had no prior contact with the criminal justice system.

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[4] *People v. Elia*, (Michigan Court of Appeals Docket No. 143451) (September 30, 1992). Petitioner had served fifteen (15) months of his two (2)-year minimum sentence when the mandatory minimum was changed to five (5) years.

Fields, 448 Mich. at 80.

As a result of *Fields*, Petitioner brought a belated motion to reinstate his original two (2)-year sentence. After review of a report from the Department of Corrections and his Parole Officer, the criminal trial judge reinstated the originally imposed sentence of two (2) to twenty (20) years. However, by that time, Petitioner, tragically, had already served five (5) years in prison, three (3) years unnecessarily, as subsequent developments demonstrated.

Petitioner seeks review of the United States Court of Appeals decision based on a denial of procedural due process on grounds that it is in conflict with a decision of the Seventh Circuit. We believe that the Immigration and Naturalization Service ("INS") delayed and failed to begin removal proceedings for Mr. Elia as expeditiously as possible after the date of his conviction. On December 26, 1991, the INS served Petitioner with an Order to Show Cause and Notice of Hearing. Shortly before service of the Order to Show Cause and at the advice of his criminal defense counsel, Petitioner orally requested § 212(c) waiver from an Immigration Officer, a request the Sixth Circuit found to be *dehors* the record (*see* App., p. 3a).

Petitioner did not appear before an Immigration Judge until October 25, 1996 when he formally requested § 212(c) waiver. Had Petitioner received a hearing date shortly after he received his Order to Show Cause and Notice of Hearing, he would have been eligible for § 212(c) relief. As will be seen *infra*, the Seventh Circuit, in a case with similar facts, found that the delay of the INS was, in due process terms, fundamentally unfair and that Petitioner there set forth a substantial constitutional claim. In both cases, the INS delay caused the petitioners significant hardship because intervening

changes in the law deprived them of eligibility for discretionary relief from deportation.

Petitioner also seeks review of the Sixth Circuit Court of Appeals decision in this case which we believe is in conflict with other District Court cases from other federal trial courts in other jurisdictions.[5] It would cause a manifest injustice to Petitioner, and others similarly situated,[6] if the extra time Petitioner served, because of an improperly imposed sentence and bureaucratic delays, effectively deprived him of § 212(c) waiver access. The INS apparently believes that the five (5) years "served" is that time actually served, even if illegally or inappropriately or improperly imposed, mandating such later relief as reductions in sentences, vacated sentences or

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[5] The REAL ID Act, 8 U.S.C. § 1252, which became effective on May 11, 2005, gave Circuit Courts jurisdiction to review final orders of deportation. Prior to its enactment, the District Courts maintained jurisdiction by habeas corpus review, pursuant to 28 U.S.C. § 2241.

[6] This Court has previously noted that, although it proves difficult to determine a reliable estimate of the size of the class of § 212(c) waiver applicants, the class of § 212(c) waiver applicants is large. *See Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 296 (2001) (...[T]he class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted. Consequently, in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens." *Id.* This Court also noted that the 1990 Congressional amendments to § 212(c) barring discretionary relief for those who served a term of imprisonment of at least five years has put some limitation on the availability for § 212(c) waiver for applicants such as Petitioner. *See infra.*

reversed sentences. We think that other unfortunate aliens like Mr. Elia, i.e. people found to be ineligible for § 212(c) waiver, have legitimate and enforceable due process objections to the INS' legal view of § 212(c).

REASONS WHY THIS WRIT SHOULD BE GRANTED

I. THE SIXTH CIRCUIT OPINION IS IN CONFLICT WITH THE SEVENTH CIRCUIT OVER WHETHER A PETITIONER WAS DENIED HIS PROCEDURAL DUE PROCESS RIGHTS WHEN THE INS UNREASONABLY DELAYED ITS HEARING AND CONSIDERATION OF HIS § 212(C) WAIVER FOR OVER FIVE (5) YEARS WHEN, BECAUSE OF A CHANGE IN THE LAW, SUCH DELAY EFFECTIVELY PRECLUDED PETITIONER FROM APPLYING FOR SUCH RELIEF.

The Sixth Circuit erroneously found that the delay of the Department of Homeland Security ("DHS")[7] in failing to "begin any removal proceeding as expeditiously as possible after the date of the conviction" in accordance with 8 U.S.C. § 1229(d) did not afford Petitioner fundamental, procedural due process rights. (App., p. 12a-13a) Specifically, while the Sixth Circuit cited authority supporting its claim that this inexplicable delay did not create due process rights, it also acknowledged that there was contrary authority, *Singh v.*

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[7] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the DHS, pursuant to § 441 and § 471 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

Reno, 182 F.3d 504, 510-511 (7th Cir. 1999), a case that held that this very type of unreasonable delay does create due process rights. (App., p. 13a). Yet, the Sixth Circuit still concluded, "[t]he cases cited above correctly conclude that this delay does not violate any property or liberty right protected by the Due Process Clause." (App., p. 13a).

In *Singh v. Reno*, the Seventh Circuit agreed with Petitioner that the "foot-dragging of the INS led to a denial of his due process rights." As to the due process implications of an unexplained four (4)-year delay, the Seventh Circuit noted in *Singh*, 182 F.3d 504, at 510-511:

> Although the INS issued the OSC [Order to Show Cause] on October 9, 1992, Singh's case was not calendared for hearing until late 1996. By this time, of course, the 1996 Amendments had come into effect and with them the bar on Singh's right to apply for a discretionary waiver. Thus, when Singh was entitled to apply for relief, he was practically prevented from doing so and, as soon as he was free to apply, he found that he was no longer entitled. Singh blames the INS for this Kafkaesque turn of events.... We find the government's explanation unconvincing.... In our view, Singh has stated the basis of a constitutional claim that entitles to review in this Court.

Like the petitioner in *Singh*, Petitioner Elia suffered extremely serious prejudice from the unreasonable five (5)-year delay of the INS in scheduling his hearing. Like the petitioner in *Singh*, Petitioner Elia was eligible to apply for

then-applicable relief at the time the INS issued an Order to Show Cause and Notice of Hearing.[8]

8 C.F.R. § 242.1(a) regarding Order to Show Cause and Notice of Hearing, as amended March 6, 1996, states, "...Every proceeding to determine the deportability of an alien...is commenced by the filing of an order to show cause with the Office of the Immigration Judge...."

Petitioner was served with the INS Order to Show Cause on December 26, 1991. Shortly before that date, Officer Rebecca Smith of the INS questioned Petitioner in prison with regard to his deportability. Petitioner was well aware of the deportation consequences of his offense since his criminal defense counsel had brought them to his attention. He was instructed by his criminal defense counsel to ask for § 212(c) waiver immediately and he made such request to Officer Smith (which, again, the Sixth Circuit rejected for the lack of a record at App., 3a).

The INS Order to Show Cause stated: "You will be notified concerning the date, time and place by the Immigration Court and Show Cause why you should not be deported from the United States." However, the INS did not bother to provide a date for the Show Cause Hearing until October 9, 1996, inexplicably approximately five (5) years after Mr. Elia had requested a hearing. There was no record explanation for the delay beyond the inertia of bureaucratic

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[8] Before IIRIRA, a petitioner's eligibility for § 212(c) waiver would be determined based upon the length of his incarceration at the time the Immigration Judge considered his application, not the length of his sentence. *Matter of Ramirez-Somera*, 20 I&N Dec. 564 (1992).

intransigence. In fact, Petitioner's counsel filed a written motion for bond on October 8, 1996 to release Petitioner from INS custody. This suddenly caused a hearing for the bond and triggered the Order for Show Cause to be set for October 16, 1996. Nearly five (5) years elapsed between service of the initial Order to Show Cause and the requested Hearing. In *Singh*, a delay of four (4) years with concomitant substantive effects because of the passage of time-encompassing legal changes was held sufficient to deprive a party of procedural due process. This was so, when, as here, subsequent, substantive legal changes made the discretionary relief of requesting and obtaining §212(c) waiver legally unavailable.

While the Code of Federal Regulations does not state specifically how much time may elapse between the service of an Order to Show Cause and a Hearing for deportation, the INS must conduct the Hearing within a "reasonable time" of service of the Order. Five (5) years cannot be construed, by any stretch of the imagination, as a "reasonable time." As has been noted by the Supreme Court of the United States in other immigration contexts, there are judicial limits to be imposed if the INS unreasonably delays matters. See *Reno v. Flores*, 507 U.S. 292, 314-315 (1993) (*semble*); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (the Immigration and Nationality Act contains an implicit reasonableness requirement for INS to act with dispatch for necessary removal hearings in light of due process demands).

Had the INS conducted their § 212(c) hearing while the criminal trial judge's initial two (2)-year sentence was in place, Petitioner would then have been eligible for relief, indubitably. Even more egregious is the fact that the delay caused substantial harm and a deprivation of freedom for Petitioner, based upon the prejudice of substantive legal

changes which was (or could have been) outcome determinative.

Additionally, the Order to Show Cause specifically stated:

> You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the government...You will be advised by the Immigration Judge before whom you appear, of any relief from deportation, including the privilege of departing voluntarily, for which you may appear eligible.

Petitioner was misled and detrimentally relied upon the representations made by the government in the Order to Show Cause. Petitioner did not know any better than to wait patiently for government action, while the government was effectively silently eroding his rights by legal changes he could not know about.

On December 28, 1992, the Department of Justice proposed a rule which would have amended 8 C.F.R. § 3.0 by requiring an Immigration Judge to conduct a hearing on the merits within thirty (30) days after the filing of the Order to Show Cause in the case of an alien who was charged in the Order as an alien who has been convicted of an aggravated felony. The object of the amendment was to implement the congressional mandate to protect society from serious criminal offenders pursuant to §§ 242 (h)-(i) and § 242A of the Act by facilitating their removal as expeditiously as possible upon a finding of deportability under § 241(a)(2)(A)(iii). While the proposed rule was not promulgated, it certainly indicates what the Department of

Justice considered to be "reasonable time" from the time an Order to Show Cause was issued and a Hearing was to occur. Interestingly, this rule was proposed in 1992, at a time when Petitioner was patiently waiting in prison for the INS to set the date for hearing.[9]

On March 6, 1996, the Department of Justice added the position of institutional hearing program director to the list of INS officials authorized to issue Orders to Show Cause and warrants of arrest. The INS placement of special agents at correctional institution sites facilitated the processing of criminal aliens for deportation proceedings.

Consequently, the Federal Register states in the "Supplementary Information" section:

> The Institutional Hearing Program (IHP) represents one of the Service's major undertakings to process criminal aliens while they are incarcerated in correctional institutions and to obtain orders of deportation prior to their release from imprisonment.
>
> * * *
>
> Sending Orders to Show Cause or warrants of arrest to another Service office location frequently causes an

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[9] Petitioner brought to the Sixth Circuit's attention, at oral argument below, that an Immigration Judge and District Counsel would (and did) conduct hearings on deportation proceedings at the prison located at 4000 Cooper Street in Jackson, Michigan during the time period that Petitioner was waiting for his hearing.

unnecessary delay in the processing of the criminal alien.[10]

Had Petitioner been given the "speedy trial"-style opportunity to seek § 212(c) relief in 1991, the Immigration Judge would have likely granted him § 212(c) waiver. After all, the trial judge in Petitioner's criminal matter had decided that there were sufficient equities that made her vary downward from the statutory minimum sentence.

In a sense, this case revisits the unfairness of governmental action stripping away Petitioner's "vested rights," a palpable violation of due process, forbidden by *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 321-326 (2001). While we do not have a retroactive statute at issue here, the Petitioner whose guilty plea was made in obvious contemplation of the possible effect of his deportation demonstrates the same genre of prejudice. We have an unexplained and highly prejudicial delay by the INS accomplishing the precise legal result—with the stunning

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[10] In 1996, the Department of Justice was interested in preventing unnecessary delay in the processing of criminal aliens and this further emphasizes the fact that the Department of Justice recognized a problem with the delays of INS in cases precisely like Petitioner's.

Petitioner was initially interviewed at the prison site in Jackson, Michigan by Officer Rebecca Smith at which time Petitioner requested § 212(c) waiver. Assistant Director of Investigations, Francis D. Falkowski of the Detroit INS Office issued the Order to Show Cause in Petitioner's case. The Order to Show Cause was then sent to Petitioner in Jackson. Even though INS court hearings were taking place in Jackson, Michigan at the time, no hearing was set for Petitioner and unnecessary delays therefore occurred because of the various INS service locations involved in processing.

passage of time taking place in ignoring a request for a hearing, which was acted upon with the speed of a receding glacier.

Put another way, Mr. Elia pled guilty in June 1991 and he orally requested § 212(c) waiver in December 1991, when he was served with his Order to Show Cause. The five (5)-year delay in scheduling the hearing was apparently made parallel with the service of his five (5)-year sentence. Like *St. Cyr*, the prejudice to him was incalculable because his ultimate reduction to two (2) years meant he had already served his sentence by the time formal deportation proceedings had started. In a very real sense, this is the correlative alter ego of a due process denial by enactment of a retroactive statute eclipsing "vested rights" *ex post facto*, just by different administrative means. Here, however, it was unexplained bureaucratic inertia that harmed Petitioner. We say that due process considerations cover the forms of fundamental unfairness in the manner that *St. Cyr* condemned.

In *Singh*, the Seventh Circuit Court of Appeals held that "unusual circumstances" of a delay in hearing a very similar case implicated procedural due process constitutional rights. *Id.* at 510. The *Singh* court stated:

> [W]e believe that [Petitioner's] Homeric odyssey through the administrative and judicial process adds up to a highly unusual case. Recall that six and one half years have elapsed since the INS issued the [Order to Show Cause] and that, of crucial significance, it was [Petitioner] who pressed to have the matter resolved. *Id.* at 510-11.

The *Singh* case may not have been as unusual as the Seventh Circuit may have anticipated. Petitioner Elia has also

been on an odyssey that has led him to the Immigration Court twice, three (3) times to the Board of Immigration Appeals and to the Sixth Circuit Court. Approximately five (5) years elapsed in his case from the time he asked for § 212(c) waiver and was served with the Order to Show Cause to the time of his hearing that was the result of his request for bond.

We respectfully request an opportunity to have the Supreme Court of the United States resolve whether these half-decade delays, replete with highly prejudicial legal changes constitute procedural due process violations.

We respectfully pray and request that the Supreme Court of the United States grant the present Petition so as to allow full calendar briefing as to a matter of great jurisprudential, national and constitutional importance.

II. THE SIXTH CIRCUIT DECISION IS IN CONFLICT IN THIS CASE WITH OTHER DECISIONS OF VARIOUS UNITED STATES DISTRICT COURTS OVER THE INTERPRETATION OF "TERM OF IMPRISONMENT" IN § 212(C) WAIVER CASES. THE SIXTH CIRCUIT THEREFORE ERRED IN DISREGARDING THE DUE PROCESS EFFECT THAT THE INTERPRETATION AND ADMINISTRATION OF MICHIGAN'S MANDATORY MINIMUM LAW HAD ON PETITIONER WHEN PETITIONER HAD IMPROPERLY SERVED THREE YEARS MORE THAN HIS FINAL SENTENCE.

The Sixth Circuit Court erroneously found Petitioner ineligible for § 212(c) waiver even though Petitioner had ultimately been sentenced to a term of imprisonment of less than five (5) years. Specifically, the Sixth Circuit found,

"[d]etermining whether imprisonment has made an alien ineligible for § 212(c) relief 'turns not on the sentence imposed but on the period of **actual** incarceration,'" *citing United States v. Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001) (App., p. 10a –11a) (Emphasis supplied).

Since 2001, several district courts within the Second Circuit's jurisdiction have again been faced with the issue of whether to determine § 212(c) statutory eligibility by looking at the time of imprisonment actually served. In 2003, for example, the United States District Court for the District of Connecticut found in a very similar case that petitioner's "relevant sentence for purposes of his eligibility for a § 212(c) waiver is not the sentence originally imposed...[w]hen petitioner's sentence was vacated...it became a nullity, thus of no legal effect." *Mandarino v. Ashcroft*, 318 F. Supp. 2d 13, 17 (D. Conn. 2003). The District Court remanded the case back to the Immigration Judge for further proceedings.

In 2004, this issue was again raised when other petitioners argued that they were statutorily eligible for § 212(c) waiver even though by the time their cases were reopened or remanded, they had served more than five (5) years in prison. The Second Circuit declined to reach the issue of whether as a matter of statutory construction, an alien's eligibility for § 212(c) waiver should be determined by reference to his or her status at the time of the entry of a final order of deportation. Instead, the Second Circuit agreed with petitioners' claim that they should be awarded *nunc pro tunc* § 212(c) relief. *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004).

Analogous to the petitioner in *Mandarino*, Petitioner's sentence was vacated and he was re-sentenced.[11] Consequently, the Court in *Mandarino* stated, "the relevant sentence for purposes of determining eligibility for waiver is the sentence of 48 months and 360 days. **There is no basis on which to hold petitioner accountable for a sentence in excess of that authorized imposed as a consequence of ineffective assistance of counsel at the time of his sentencing.**" 318 F.Supp. 2d at 17 (Emphasis supplied).

Like the petitioner in *Mandarino*, Petitioner Elia should not be penalized for serving a sentence that was later found to be inappropriately or illegally harsh, and reduced. Is it possible, in consideration of substantive due process that the INS can refuse a § 212(c) waiver simply because Petitioner served an excessive sentence, or one vacated on appeal or one in which, like Mr. Elia's, the sentence was ultimately reduced for substantive legal reasons?

According to the laws in the State of Michigan, the criminal trial judge reinstated Petitioner's original sentence of two (2) years minimum to twenty (20) years maximum on

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[11] Unlike the petitioner in *Mandarino*, Petitioner was re-sentenced to his *original* sentence, and this original sentence was two (2) years minimum to twenty (20) years maximum. The petitioner in *Mandarino* was originally sentenced to nine (9) years imprisonment followed by five (5) years of supervised release. Petitioner acknowledges that it is uncertain how long he would have served in prison, but his parole discharge report indicated that he had an exemplary reputation in prison as he was granted "parole without hearing." A grant of parole without a hearing or interview reflects Petitioner's good reputation, as usually the parole board wants to hold a hearing or interview with individuals before releasing them on parole.

November 13, 1996 after Petitioner had served the longer five (5) year minimum sentence. Except for the elongated legal dispute over mandatory minimum sentences in Michigan, Petitioner would have served only a two (2)-year sentence.

Not only did Petitioner serve an "improper" sentence of almost five (5) years, three (3) years longer than he should have, he is potentially subject to adverse immigration consequences as a result of the improper sentence inextricably linked with his serving the sentence. This may have motivated the INS to postpone his § 212(c) waiver request unfairly. Equity and the interests of judgment should preclude 8 C.F.R. § 1212.3(f)(4) from being a bar to Petitioner obtaining a hearing for § 212(c) waiver.

Importantly, Petitioner initially entered a guilty plea in reliance on being sentenced to a two (2)-year minimum sentence, less than five (5) years, so that he would have been eligible for § 212(c) waiver.[12]

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[12] This Court noted in *St. Cyr*, 533 U.S. at 321-22 that plea agreements "involve a *quid pro quo* between a criminal defendant and the government," *citing Newton v. Rumery*, 480 U.S. 386, 393, n.3 (1987). This Court went on to point out that defendants waive several of their constitutional rights in exchange for benefits. *St. Cyr*, 533 U.S. at 322. Consequently, this Court concluded, "There can be little doubt that...alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions...[g]iven the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA...preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial. *Id.* (Citations omitted.)

Other courts have also acted to prevent manifest injustice[13] when a § 212(c) waiver would have been granted but for a prejudicial vagary imposed by changes in the law. In *Greenidge v. INS*, 204 F.Supp. 2d 594 (S.D.N.Y. 2001), the petitioner filed an application for § 212(c) waiver less than five years into his incarceration. The Immigration Judge erroneously decided that Greenidge was ineligible for § 212(c) waiver due to the passage of IIRIRA. The Immigration Judge's deportation order was challenged in a habeas corpus petition. The INS claimed that Greenidge was barred from § 212(c) waiver because he had served over five (5) years in prison by the time the habeas corpus petition was heard. The District Court wrote:

> Although [*Buitrago-Cuesta*[14]] seems to suggest that the five (5)-year clock continues to run at least until an alien's administrative appeals are exhausted, it does

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[13] Further, it is in the interests of equality and fairness to extend some form of mercy to the class of § 212(c) waiver applicants in which Petitioner finds himself. As the Honorable Learned Hand so aptly stated in *United States ex rel. Klonis v. Davis, Secretary of Labor*, 13 F.2d 630, 631 (2d Cir. 1926):

> At any rate we think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in [his native country] as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples...

[14] *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993).

> not suggest what result should be reached, where, as here, the IJ's decision subsequently proves to be incorrect. In this case, it is only because the IJ reached a decision adverse to petitioner that the proceedings were extended and petitioner's incarceration passed the five-year mark before the merits of his Section 212(c) application could be addressed. It is at least fairly arguable that petitioner should not forfeit the right to seek a Section 212(c) humanitarian waiver of removal solely as a result of an incorrect decision by the IJ.

204 F. Supp. 2d at 598.

Greenidge is somewhat analogous to the case at bar since an incorrect decision the Michigan Court of Appeals led to Petitioner Elia improperly serving more than his original sentence, a sentence ultimately corrected downward to two (2) years. It is also fairly arguable in this case that Petitioner should not forfeit a right to seek § 212(c) humanitarian waiver of removal solely as a result of an incorrect decision by the Michigan Court of Appeals, ultimately corrected after the Michigan Supreme Court decided *People v. Fields, supra,* when the trial court re-imposed the original sentence back to two (2) years.

Consider, further, *Archibald v. INS,* 2002 WL 1434391 (E.D. Pa. July 1, 2002), where Petitioner's delays caused him to be precluded from § 212(c) waiver by virtue of § 440(d) of AEDPA. When Archibald brought a habeas corpus petition, the district court found that AEDPA was not to be retroactively applied, but by that time, Archibald had served over five (5) years in prison.

Regardless, the District Court Judge found that when the BIA determined Archibald was ineligible for § 212(c) waiver, he had only served three (3) years of his imprisonment term. The Court held:

> In fact, at no point during the pendency of Archibald's removal proceedings did his term of imprisonment cross the five-year threshold... Archibald's time in prison did not "pass the five year mark" until 1999, after both the IJ and the BIA rendered their decisions...Therefore, Archibald was entitled to apply for a discretionary waiver...

Archibald v. INS, 2002 WL 1434391, at *6 (E.D. Pa. July 1, 2002) (Citations omitted.)

Petitioner Elia's case is more compelling--and much more troubling--than *Archibald* since Petitioner Elia did not contribute to the delays in his case. In fact, unlike the case at bar, in *Archibald*, the INS acted in an expeditious fashion in issuing the Order to Show Cause within approximately four (4) months from the guilty plea; three (3) months later the first Immigration Court hearing took place.

Instead, the interminable delays in Petitioner's case were caused solely by the INS. In addition to the delays mentioned *supra*, after he finished serving his state sentence, Petitioner remained incarcerated for an additional three (3) months waiting for the INS to pick him up from the state prison facilities. Petitioner had to file a Petition for Habeas Corpus in order to "motivate" the INS to take him into custody. Only after Petitioner filed a motion for a bond to be released from INS custody did he receive the hearing he had requested and been promised five (5) years earlier for § 212(c) waiver. By that time, he was found ineligible due to the "Catch 22"

retroactive application of AEDPA. So began his appeals to seek the humanitarian § 212(c) waiver, finally leading him to the Supreme Court of the United States as his last hope.

CONCLUSION

Mr. Elia is certainly not the only alien who could be deported by the INS' inexplicable administrative delays, inertia which spreads out so long that, in the interim, sea changes of legal developments will have unfairly caught many people in bitterly unfair snares, due, again, to the refusal of the INS to be prompt.

Mr. Elia is certainly only one among many aliens sought to be deported because of served criminal sentences which, in the course of justice, became reduced, reversed, vacated, commuted, suspended or negated, leaving these persons without access to § 212(c) waiver. These persons are to be deported not only because the criminal justice system has failed them, but because the administrative system has worked an injustice as well. These delays and these refusals by the INS to deal with reduced or vacated sentences--only with the time actually served whether excessive or not--should be seen as deprivation of due process, whether regarded as procedural or as substantive.

Petitioner respectfully requests that this Court grant the within Petition for Certiorari to explore whether the Supreme Court of the United States should vacate his deportation order and find that Petitioner meets the threshold criteria for § 212(c) waiver eligibility.

Respectfully submitted,

John P. Jacobs
Counsel of Record
John P. Jacobs, P.C.
719 Griswold Street
Suite 600
Detroit, MI 48232
(313) 965-1900

Marisa C. Petrella
Co-Counsel for Petitioner
Petrella & Associates, P.C.
26211 Central Park Boulevard
Suite 302
Southfield, MI 48076
(248) 223-9880

APPENDIX A

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3446

[Filed October 24, 2005]

JAWDAT ELIA	)
Petitioner,	)
	)
v.	)
	)
ALBERTO GONZALES	)
Attorney General,	)
Respondent.	)
	)

JUDGES: Before: SILER and ROGERS, Circuit Judges; REEVES, District Judge.*

AMENDED OPINION

Jawdat Elia petitions for review of an order of the Board of Immigration Appeals ordering Elia deported to Iraq. In 1991, while a lawful permanent resident of the United States,

* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Elia was convicted in Michigan of a drug-related offense. After the Immigration and Naturalization Service ("INS") initiated deportation proceedings against Elia on the basis of this conviction, Elia petitioned for a waiver of deportability under the former § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Ultimately, an Immigration Judge ("IJ") found that Elia was statutorily ineligible for the waiver because he had served a sentence of at least five years for the commission of an aggravated felony. The Board of Immigration Appeals ("BIA") summarily affirmed. In petitioning for review, Elia does not dispute that he was convicted of an aggravated felony. Further, he conceded at oral argument that he in fact served a five-year term of imprisonment. Instead, Elia challenges his order of removal by arguing on constitutional and equitable grounds that the IJ improperly found him ineligible for § 212(c) relief. These challenges lack merit; therefore, we deny the petition for review.

On April 2, 1991, Elia pled guilty to possessing a controlled substance, in violation of Michigan Compiled Laws § 333.7403(2)(a)(iii).[1] Although that offense carried a minimum sentence of five years, the trial court sentenced Elia to a term of two to twenty years in prison. Sentencing occurred on June 28, 1991. The trial court gave Elia two days' jail credit toward his sentence. An information sheet from the Michigan Department of Corrections ("MDOC") indicates that Elia's "corrected date" of sentence is therefore June 26, 1991.

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[1] The Michigan Court of Appeals subsequently found that Elia had actually pled guilty to delivery of a controlled substance, Mich. Comp. Laws § 333.7401(2)(a)(iii). The Michigan Court of Appeals ordered the trial court to amend the judgment to reflect this.

In November 1991, while Elia was serving his sentence, the INS issued a detainer requesting that the MDOC notify the INS thirty days before Elia's release from prison in order for Elia to be transferred to INS custody. On December 26, 1991, the INS served Elia with an Order to Show Cause and Notice of Hearing ("OSC"). The OSC charged Elia with deportability under Immigration and Nationality Act ("INA") §§ 241(a)(2)(A)(iii) (an aggravated felony) and 241(a)(2)(B)(I) (controlled substance violation). Elia was deportable based on his April 1991 drug conviction. Elia alleges that he orally requested § 212(c) relief when he met with an INS officer earlier in December 1991; however, nothing in the record supports this claim. Petitioner's Br. at 7.

The prosecutor appealed the sentence in Elia's case; on September 30, 1992, the Michigan Court of Appeals held that the trial court did not have discretion to deviate downward from the statutory minimum sentence of five years. Therefore, on March 9, 1993, Elia was resentenced to a term of five to twenty years' imprisonment, rather than two to twenty years. An MDOC document entitled "Custody Release" confirms that Elia completed his prison term and was released on parole, and entered INS custody, on October 1, 1996.[2]

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[2] Initially, Elia disputed on appeal that he had served a greater-than-five-year prison sentence. On May 24, 1996, the MDOC listed Elia's projected parole date as June 25, 1996. In his brief, Elia relied on the projected date to argue that since he was sentenced on June 28, 1991, his term of imprisonment lasted three days short of five years. However, the MDOC "Custody Release" document establishes that Elia was released on parole on October 1, 1996. When a Michigan trial court reinstated Elia's two-to-twenty-year sentence on April 18, 1997, it gave Elia credit for 1922 days, or 5 years and 97 days, toward his sentence. A sentence of June 25, 1991, to October 1, 1996, would encompass this

Elia sought to have his two-to-twenty-year sentence reinstated; he succeeded in this effort only after his prison term was finished. The Michigan Supreme Court held in *People v. Fields*, 448 Mich. 58, 528 N.W.2d 176 (Mich. 1995), that discretionary sentencing below the statutory minimum is permissible in some circumstances. The Government notes that based on *Fields*, Elia petitioned a Michigan trial court to reinstate his original sentence. Respondent's Br. at 4. (The Joint Appendix contains the document reflecting Elia's restored sentence, but it does not contain his petition.) The trial court reinstated the sentence on April 18, 1997, after the completion of Elia's prison term.

On October 25, 1996, Elia appeared before an IJ and formally requested § 212(c) relief. The IJ found that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") eliminated § 212(c) relief for any alien convicted of an aggravated felony; further, the IJ found, this provision applied retroactively to convictions before AEDPA's effective date. The BIA affirmed on July 23, 1997.

Subsequently, Elia moved to reopen his case, arguing in part that AEDPA should not apply retroactively to bar § 212(c) relief for aggravated felons. The BIA reopened the case, because this court's decision in *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999), prohibited retroactive application of this AEDPA provision. On October 17, 2001, the IJ, on remand, determined that Elia was nonetheless ineligible for § 212(c) relief, because he had served a term of at least five years in prison. The IJ found that Elia "was, in fact, paroled from

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number of days. Substantial evidence supports the IJ's conclusion that Elia served a sentence of this length. At oral argument, counsel for Elia conceded that Elia had served a five-year term.

[MDOC] custody on October 1, 1996 and was released on that date . . . ." Noting Elia's argument that he actually was released from custody on his projected parole date-June 25, 1996-the IJ found that even accepting this version of the facts, Elia had still served five years in prison, because Elia had received two days' jail credit when he was sentenced on June 26, 1991. The BIA affirmed without an opinion on February 25, 2003. This petition for review followed.

Because Elia is deportable by reason of his conviction for an aggravated felony, this court has jurisdiction to review only questions of law Elia raises in petitioning for review of his order of deportation. *See* 8 U.S.C. § 1252(a)(2)(D) (2001), *amended by* REAL ID Act § 106(a)(1)(A)(iii), Pub. L. No. 109-13, Div. B, 119 Stat. 231, 310 (2005). Recent changes in the law benefit Elia: the REAL ID Act both places Elia's petition for review of his *deportation* order under the set of judicial review rules applicable to *removal* cases, and also expands this court's direct review of removal orders. Nonetheless, because Elia argues no persuasive legal ground for vacating his deportation order, we deny the petition for review.

Where, as here, the BIA summarily affirms an IJ's order of deportation, this court directly reviews the IJ's decision. *See Denko v. INS,* 351 F.3d 717, 730 (6th Cir. 2003). This court reviews de novo Elia's constitutional challenges to the IJ's denial of § 212(c) relief. *Mikhailevitch v. INS*, 146 F.3d 384, 391 (6th Cir. 1998).

INA § 106, 8 U.S.C. § 1105a (1994), originally provided the procedure allowing aliens to petition for judicial review of

a final order of deportation.[3] *See Pak v. Reno*, 196 F.3d 666, 670 n.4 (6th Cir. 1999). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") repealed INA § 106. IIRIRA § 306(b), Pub. L. No. 104-208, Div. C, tit. III, 110 Stat. 3009 (1996) (codified at Historical and Statutory Notes, 8 U.S.C. § 1101 (2001)). IIRIRA created "transitional rules" narrowing court jurisdiction to review deportation orders entered after October 30, 1996, in proceedings commenced before the effective date of the permanent amendments, April 1, 1997. *See* IIRIRA § 309(c)(4) (transitional rules); *id.* § 309(a) and (c)(1) (transitional rules apply to deportation proceedings pending on [April 1, 1997]); *id.* § 309(c)(4) (transitional rules apply to cases in which final order of deportation is entered [after October 30, 1996]); *see also Pilica v. Ashcroft*, 388 F.3d 941, 947 (6th Cir. 2004) (defining "transitional rules" cases). At the same time, IIRIRA created the "removal" proceeding.[4] IIRIRA also amended INA § 242, 8 U.S.C. § 1252, to impose new permanent rules restricting review of final orders of removal. *See* 8 U.S.C.§ 1252(a) (2001). Like the transitional rules, these new rules are more restrictive of judicial review

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[3] The former § 1105a(c), INA § 106(c), provided that an order of deportation "shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations. . . ." 8 U.S.C. § 1105a(c) (1994), *repealed by* IIRIRA § 306(b), Pub. L. No. 104-208, Div. C, tit. III, 110 Stat. 3009 (1996).

[4] Through removal, IIRIRA fused two previously distinct expulsion proceedings, deportation and exclusion. *Jama v. Imm. & Customs Enforcement*, __ U.S. __, 125 S. Ct. 694, 704 (2005). Expulsion proceedings initiated after the April 1, 1997 effective date are removal proceedings.

than the former INA § 106. On May 11, 2005, Congress enacted the REAL ID Act, which provides:

> A petition for review filed under former section 106(a) of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by this section.

REAL ID Act § 106(d), 119 Stat. 310-311 (effective on date of enactment). Petitions for review in "transitional rules" cases are filed under the procedure created by the former section 106(a). *See Pak*, 196 F.3d at 670 n.4. Therefore, the REAL ID Act effectively subjects orders of deportation in "transitional rules" cases to the same rules of judicial review, 8 U.S.C. § 1252(a), as apply to removal orders.

Since deportation proceedings against Elia were commenced before April 1, 1997, and the final order of deportation was entered after October 30, 1996, his is a "transitional rules" case. Because of the REAL ID Act amendments, 8 U.S.C. § 1252 now determines whether this court has jurisdiction to review the final order of deportation in Elia's case.

Further, the REAL ID Act's amendments to 8 U.S.C. § 1252 give us jurisdiction to review Elia's claims. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), bars courts from reviewing any final order of removal against an alien who is removable by virtue of, inter alia, having been convicted of an aggravated felony. Elia was found deportable on this basis. However, 8 U.S.C. § 1252(a)(2)(D), as amended by REAL

ID Act § 106(a)(1)(A)(iii), 119 Stat. 310, provides that § 1252(a)(2)(C) "shall [not] be construed as precluding review of constitutional claims or questions of law raised upon a petition for review. . . ."[5] Elia raises legal, rather than

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[5] In *Calcano-Martinez v. INS*, 533 U.S. 348, 150 L. Ed. 2d 392, 121 S. Ct. 2268 (2001), the Supreme Court held that § 1252(a)(2)(C) barred direct review of the BIA's denial of § 212(c) relief to petitioners convicted of aggravated felonies, where the petitioners conceded that they were removable but disputed the BIA's findings on § 212(c) eligibility. *Id.* at 349-50. The Court stated, "Leaving aliens without a forum for adjudicating claims such as those raised in this case would raise serious constitutional questions." *Id.* at 351. The Court noted, however, that it had found in *INS v. St. Cyr*, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001), that petitioners could seek review of removal orders in this situation through petitions for habeas corpus. *Calcano-Martinez*, 533 U.S. at 351. *Calcano-Martinez* suggested that habeas corpus should be the primary vehicle of review when an alien removable by reason of having been convicted of an aggravated felony, objects to an order of removal on the grounds that the alien was actually eligible for § 212(c) relief.

Through the REAL ID Act, Congress amended § 1252 to change this state of affairs. The new § 1252(a)(2)(D) restores direct review of constitutional and legal grounds for objecting to an order of deportation or removal against an aggravated felon; however, the REAL ID Act amendments limit habeas relief. *See* 8 U.S.C. § 1252(a)(5) and (e) (petitions for review sole means for judicial review of removal orders, save for limited habeas review of expedited removal orders); REAL ID Act § 106(d), 119 Stat. 311 (petitions for review sole means of judicial review of transitional rule deportation cases, treated effectively as removal cases under the new scheme). The new § 1252(a)(2)(D) therefore appears to abrogate this court's decisions in *Patel v. Ashcroft*, 401 F.3d 400, 406 (6th Cir. 2005), *Pulice v. INS*, 218 F.3d 505, 507-508 (6th Cir. 2000), and *Mansour v. INS*, 123 F.3d 423, 425-426 (6th Cir. 1997), which held that, when an alien is removable by reason of

factual, arguments concerning his eligibility for § 212(c) relief.

In order to qualify for relief under the former § 212(c), an applicant must be a lawful permanent resident of the United States, and must have been domiciled in the United States for seven consecutive years. 8 U.S.C. § 1182(c) (1994), *repealed by* IIRIRA § 304(b), 110 Stat. 3009; 8 C.F.R. § 212.3(f)(2) (2004) (barring § 212(c) relief for aliens who have not met these requirements). The relief is at the Attorney General's discretion. 8 U.S.C. § 1182(c) (1994). Aliens convicted of one or more aggravated felonies, who have served a term of imprisonment of at least five years, are ineligible for § 212(c) relief. *Id.*; 8 C.F.R. § 212.3(f)(4).[6] While the former § 212(c) explicitly applied only to respondents in exclusion proceedings, courts have construed it as providing relief to aliens facing orders of deportation, as well. *INS v. St. Cyr*,

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conviction of an aggravated felony, this court does not have jurisdiction to review constitutional claims on petition for review of a removal or deportation order.

[6] As noted above, AEDPA eliminated § 212(c) relief for all aggravated felons, regardless of the term of imprisonment they served for their conviction. AEDPA § 440(d), Pub. L. No. 104-132, tit. IV, 110 Stat. 1214 (1996) (amending 8 U.S.C. § 1182(c) to bar § 212(c) relief for aggravated felons, among others). However, this court in *Pak*, 196 F.3d at 676, held that AEDPA § 440(d) does not apply to deportation cases pending when AEDPA was enacted on April 24, 1996. As of April 1, 1997, IIRIRA repealed § 212(c), replacing it with a new form of relief called "cancellation of removal," 8 U.S.C. § 1229b, which also barred aggravated felons from eligibility. *St. Cyr*, 533 U.S. at 297. Because Elia's deportation case was pending on April 24, 1996, he would be eligible for § 212(c) relief if he could demonstrate that he served a term of imprisonment of less than five years.

533 U.S. 289, 295, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001).

Elia contests the denial of § 212(c) relief on three grounds. At oral argument, Elia waived his fact-based argument that he served three days short of a five-year sentence and therefore was not statutorily ineligible for § 212(c) relief. Nevertheless, he argues, this court should deem him to have served only a two-year sentence, because the Michigan Court of Appeals' ultimately incorrect decision to reverse Elia's original two-to-twenty-year sentence caused Elia to "serve an 'improper' sentence of . . . three years longer than he should have." Petitioner's Br. at 15. Second, Elia argues that the Government failed to schedule a prompt deportation hearing. This delay, combined with the appeals court ruling that caused Elia to serve a five-year term, ensured that Elia would be denied § 212(c) relief. Elia argues that the Government's delay amounted to a violation of substantive and procedural due process, equal protection, and the Eighth Amendment's prohibition of cruel and unusual punishment. Third, Elia contends, equitable estoppel and the defense of laches should prevent the Government from benefitting from its delay in scheduling Elia's deportation hearing. All three grounds lack merit.

Elia requests that this court "interpret the language of 8 C.F.R. § 212.3(f)(4) in a manner so that the term of imprisonment for [Elia's] conviction was only two years, even though he served more time," because Elia was ultimately resentenced to a two-to-twenty-year term of imprisonment, rather than a five-to-twenty-year term. Petitioner's Br. at 5. This argument is unavailing. Determining whether imprisonment has made an alien ineligible for § 212(c) relief "turns not on the sentence imposed but on the period of actual incarceration." *United States v. Ben Zvi*, 242 F.3d 89, 99 (2d

Cir. 2001). In his brief, Elia provides no legal support for his assertion that the court should deem him to have served only a two-year term.[7] Parole is discretionary in Michigan. Mich. Comp. Laws § 791.234(9) (2004). There is no reason to assume that Elia would have been paroled after only two years had Elia's original two-to-twenty-year term remained in effect throughout his incarceration.[8] Deeming Elia to have served a two-year sentence for purposes of § 212(c) eligibility would disregard this reality.

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[7] At oral argument, Elia urged that this court should follow *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004), to reach this result. However, *Edwards* would not support our deeming Elia to have served a two-year term. In *Edwards*, the Second Circuit granted *nunc pro tunc* relief to two aliens who had erroneously been denied the opportunity to apply for § 212(c) relief. Both petitioners, like Elia, had been denied § 212(c) relief before the Supreme Court determined that AEDPA's bar on § 212(c) relief for aggravated felons did not apply retroactively. Unlike Elia, however, the petitioners in *Edwards* had not served five years' imprisonment at the time the IJ originally denied § 212(c) relief based on AEDPA. *Id.* at 304. "When a matter is adjudicated *nunc pro tunc*, it is as if it were done as of the time that it should have been done." *Id.* at 308. Here, the fact that Elia's § 212(c) application was once denied, incorrectly, on AEDPA-based grounds, had no relationship to the subsequent finding that Elia was ineligible because of having served five years in prison; the IJ could have rejected Elia's claim on the latter basis initially. Thus, *nunc pro tunc* relief is inapplicable here. Elia's real complaint is that the Government delayed too long between service of the OSC and scheduling a deportation hearing.

[8] There is some indication that Elia was not from the outset a model prisoner: he was disciplined for possession of dangerous contraband shortly after his prison sentence began. Factors such as this may have prevented him from serving only the minimum within his sentence range.

In addition, Elia's constitutional challenges to the denial of § 212(c) relief appear meritless. Elia argues that the Government abridged a fundamental liberty interest, in violation of substantive due process, by failing to grant Elia a deportation hearing until five years after the service of an OSC on Elia. Petitioner's Br. at 21. No authority supports Elia's contention that a speedy deportation hearing constitutes a fundamental right implicating substantive due process.

Elia's claim of a procedural due process violation also fails. While procedural due process rights extend to deportation hearings, the alien must meet the high standard of proving that a defect in deportation proceedings constituted fundamental unfairness. *See Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001). Other courts have soundly reasoned that the Government's delay in scheduling a deportation hearing after issuing an OSC does not violate due process, even if an intervening change in the law deprives an alien of eligibility for discretionary relief from deportation. *See Clavis v. Ashcroft*, 281 F. Supp. 2d 490, 496-497 (E.D. N.Y. 2003) (finding no due process violation where deportation proceedings were administratively closed in order for alien to pursue criminal appeal, and reopened only after alien was statutorily barred from § 212(c) relief); *Marmolejos v. INS*, 1995 U.S. App. LEXIS 31034, No. 95-1728, 1995 WL 639649 (1st Cir., Oct. 31, 1995) (holding that where, as here, alien was foreclosed from § 212(c) relief because the Government issued OSC before the alien had served five years' imprisonment, but held a deportation hearing only after, the alien did not have a due process right to a timely hearing); *Lopez-Moreno v. INS*, 2002 U.S. Dist. LEXIS 18489, No. 00 C 2928, 2002 WL 31133097 (N.D. Ill. Jul. 16, 2002) (same); *cf. DiPeppe v. Quarantillo*, 337 F.3d 326, 333-334 (3d Cir. 2003) (holding in habeas case, where alien was convicted in 1992 but Government initiated removal

proceedings only in 2000, when alien was automatically ineligible for § 212(c) relief by virtue of conviction for an aggravated felony, that the Government's delay in initiating removal proceedings did not violate due process); *but see Singh v. Reno*, 182 F.3d 504, 510-511 (7th Cir.1999) (granting alien's petition for review, finding colorable due process claim because INS delays, including administratively closing deportation proceedings and rescheduling deportation hearing, resulted in alien's being statutorily barred from pursuing § 212(c) relief). It is true that the Immigration and Nationality Act provides, "In the case of an alien who is convicted of an offense that makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction." 8 U.S.C. § 1229(d)(1). However, this subsection does not "create any substantive or procedural right. . . ." *Id.* § 1229(d)(2); *see DiPeppe*, 337 F.3d 326 at 333-334 (holding that § 1229(d)(2) "fatally undermines" an argument that § 1229(d)(1) creates a procedural right). In any event, § 1229(d)(1) does not directly bear on any delay in scheduling a hearing in a deportation proceeding that has previously been timely initiated; deportation and removal proceedings "commence . . . when a charging document [such as an OSC] is filed with the Immigration Court," not when the Immigration Judge holds a hearing. 8 C.F.R.§ 1003.14(a). The cases cited above correctly conclude that this delay does not violate any property or liberty right protected by the Due Process Clause.

Elia's claim of a denial of equal protection also fails, because his brief does not identify any classification the Government made, in denying him § 212(c) relief, that was not rationally related to a legitimate governmental purpose. *See Asad v. Reno*, 242 F.3d 702, 706 (6th Cir. 2001). Finally, Elia's claim that his deportation constitutes cruel and

unusual punishment lacks merit; the Eighth Amendment is inapplicable to deportation proceedings because, as the Supreme Court has held, deportation does not constitute punishment. *See INS v. Lopez-Mendoza,* 468 U.S. 1032, 1039, 82 L. Ed. 2d 778, 104 S. Ct. 3479 (1984).

Elia's equity-based arguments for opposing the denial of § 212(c) relief also lack merit. Elia argues that he orally requested § 212(c) relief when he was served with the OSC in 1991. He contends that the INS, with the purpose of rendering Elia statutorily ineligible for the relief, impermissibly delayed a deportation hearing in Elia's case. Neither the defense of laches nor the doctrine of equitable estoppel applies. The defense of laches, an equitable doctrine of uncertain relevance here, requires a showing of the plaintiff's "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity." *Kansas v. Colorado*, 514 U.S. 673, 687, 131 L. Ed. 2d 759, 115 S. Ct. 1733 (1995) (quoting Black's Law Dictionary 875 (6th ed. 1990)). Elia fails to prove that the INS exhibited neglectful delay, in violation of any law or regulation, by holding Elia's deportation hearing when it did.

Finally, there is no basis for equitable estoppel in this case. Without ever so holding, the Supreme Court has left open the possibility that a claim of equitable estoppel may lie against a federal government agency for misleading statements or actions that a private party relies upon, where the agency commits "affirmative misconduct" causing the denial of a benefit. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421-423, 110 L. Ed. 2d 387, 110 S. Ct. 2465 (1990). In the context of an estoppel claim against the government, "affirmative misconduct is more than mere negligence. It is an act by the government that either intentionally or recklessly

misleads the claimant." *Estate of James v. United States Dep't of Agric.*, 404 F.3d 989, 995 (6th Cir. 2005) (quoting *Mich. Express, Inc., v. United States*, 374 F.3d 424, 427 (6th Cir. 2004)). The IJ found no affirmative misconduct on the part of the Government. To the extent this is a factual finding, we have no jurisdiction to review it. To the extent this is a legal conclusion, it is correct. *See, e.g., INS v. Miranda*, 459 U.S. 14, 18, 74 L. Ed. 2d 12, 103 S. Ct. 281 (1982). Thus, Elia advances no equitable argument that entitles him to the benefit of § 212(c) relief.

For the foregoing reasons, we deny the petition for review.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-3446

[Filed October 24, 2005]

JAWDAT ELIA	)
Petitioner,	)
	)
v.	)
	)
ALBERTO GONZALES	)
Attorney General,	)
Respondent.	)
	)

AMENDED JUDGMENT

THIS MATTER came before the court upon a petition by Jawdat Elia for review of an order of the Board of Immigration Appeals.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED that the petition for review of the order issued by the Board of Immigration Appeals in this matter is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3446

[Filed October 18, 2005]

JAWDAT ELIA
Petitioner,

v.

ALBERTO GONZALES
Attorney General,
Respondent.

MANDATE

Pursuant to the court's disposition that was filed 7/22/05 the mandate for this case hereby issues today.

COSTS: NONE

Filing Fee . . . . . $
Printing . . . . . $

Total . . . . . $

A True Copy.
Attest:
/s/_____
Nancy Barnes
Deputy Clerk

APPENDIX C

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3446

[Filed September 29, 2005]

JAWDAT ELIA	)
Petitioner,	)
	)
v.	)
	)
ALBERTO GONZALES	)
Attorney General,	)
Respondent.	)
	)

ORDER

BEFORE: SILER and ROGERS, Circuit Judges; REEVES* District Judge.

Upon consideration of the petition for rehearing filed by the petitioner,

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* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX D

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3446

[Filed July 22, 2005]

JAWDAT ELIA
Petitioner,

v.

ALBERTO GONZALES
Attorney General,
Respondent.

JUDGES: Before: SILER and ROGERS, Circuit Judges; REEVES, District Judge.*

OPINION

Jawdat Elia petitions for review of an order of the Board of Immigration Appeals ordering Elia deported to Iraq. In 1991, while a lawful permanent resident of the United States,

* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Elia was convicted in Michigan of a drug-related offense. After the Immigration and Naturalization Service ("INS") initiated deportation proceedings against Elia on the basis of this conviction, Elia petitioned for a waiver of deportability under the former § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Ultimately, an Immigration Judge ("IJ") found that Elia was statutorily ineligible for the waiver because he had served a sentence of at least five years for the commission of an aggravated felony. The Board of Immigration Appeals ("BIA") summarily affirmed. In petitioning for review, Elia does not dispute that he was convicted of an aggravated felony. Further, he conceded at oral argument that he in fact served a five-year term of imprisonment. Instead, Elia challenges his order of removal by arguing on constitutional and equitable grounds that the IJ improperly found him ineligible for § 212(c) relief. These challenges lack merit; therefore, we deny the petition for review.

On April 2, 1991, Elia pled guilty to possessing a controlled substance, in violation of Michigan Compiled Laws § 333.7403(2)(a)(iii).[1] Although that offense carried a minimum sentence of five years, the trial court sentenced Elia to a term of two to twenty years in prison. Sentencing occurred on June 28, 1991. The trial court gave Elia two days' jail credit toward his sentence. An information sheet from the Michigan Department of Corrections ("MDOC") indicates that Elia's "corrected date" of sentence is therefore June 26, 1991.

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[1] The Michigan Court of Appeals subsequently found that Elia had actually pled guilty to delivery of a controlled substance, Mich. Comp. Laws § 333.7401(2)(a)(iii). The Michigan Court of Appeals ordered the trial court to amend the judgment to reflect this.

In November 1991, while Elia was serving his sentence, the INS issued a detainer requesting that the MDOC notify the INS thirty days before Elia's release from prison in order for Elia to be transferred to INS custody. On December 26, 1991, the INS served Elia with an Order to Show Cause and Notice of Hearing ("OSC"). The OSC charged Elia with deportability under Immigration and Nationality Act ("INA") §§ 241(a)(2)(A)(iii) (an aggravated felony) and 241(a)(2)(B)(I) (controlled substance violation). Elia was deportable based on his April 1991 drug conviction. Elia alleges that he orally requested § 212(c) relief when he met with an INS officer earlier in December 1991; however, nothing in the record supports this claim. Petitioner's Br. at 7.

The prosecutor appealed the sentence in Elia's case; on September 30, 1992, the Michigan Court of Appeals held that the trial court did not have discretion to deviate downward from the statutory minimum sentence of five years. Therefore, on March 9, 1993, Elia was resentenced to a term of five to twenty years' imprisonment, rather than two to twenty years. An MDOC document entitled "Custody Release" confirms that Elia completed his prison term and was released on parole, and entered INS custody, on October 1, 1996.[2]

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[2] Initially, Elia disputed on appeal that he had served a greater-than-five-year prison sentence. On May 24, 1996, the MDOC listed Elia's projected parole date as June 25, 1996. In his brief, Elia relied on the projected date to argue that since he was sentenced on June 28, 1991, his term of imprisonment lasted three days short of five years. However, the MDOC "Custody Release" document establishes that Elia was released on parole on October 1, 1996. When a Michigan trial court reinstated Elia's two-to-twenty-year sentence on April 18, 1997, it gave Elia credit for 1922 days, or 5 years and 97 days, toward his sentence. A sentence of June 25, 1991, to October 1, 1996, would encompass this

Elia sought to have his two-to-twenty-year sentence reinstated; he succeeded in this effort only after his prison term was finished. The Michigan Supreme Court held in *People v. Fields*, 448 Mich. 58, 528 N.W.2d 176 (Mich. 1995), that discretionary sentencing below the statutory minimum is permissible in some circumstances. The Government notes that based on *Fields*, Elia petitioned a Michigan trial court to reinstate his original sentence. Respondent's Br. at 4. (The Joint Appendix contains the document reflecting Elia's restored sentence, but it does not contain his petition.) The trial court reinstated the sentence on April 18, 1997, after the completion of Elia's prison term.

On October 25, 1996, Elia appeared before an IJ and formally requested § 212(c) relief. The IJ found that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") eliminated § 212(c) relief for any alien convicted of an aggravated felony; further, the IJ found, this provision applied retroactively to convictions before AEDPA's effective date. The BIA affirmed on July 23, 1997.

Subsequently, Elia moved to reopen his case, arguing in part that AEDPA should not apply retroactively to bar § 212(c) relief for aggravated felons. The BIA reopened the case, because this court's decision in *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999), prohibited retroactive application of this AEDPA provision. On October 17, 2001, the IJ, on remand, determined that Elia was nonetheless ineligible for § 212(c) relief, because he had served a term of at least five years in prison. The IJ found that Elia "was, in fact, paroled from

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number of days. Substantial evidence supports the IJ's conclusion that Elia served a sentence of this length. At oral argument, counsel for Elia conceded that Elia had served a five-year term.

[MDOC] custody on October 1, 1996 and was released on that date . . . ." Noting Elia's argument that he actually was released from custody on his projected parole date--June 25, 1996--the IJ found that even accepting this version of the facts, Elia had still served five years in prison, because Elia had received two days' jail credit when he was sentenced on June 26, 1991. The BIA affirmed without an opinion on February 25, 2003. This petition for review followed.

Because Elia is deportable by reason of his conviction for an aggravated felony, this court has jurisdiction to review only questions of law Elia raises in petitioning for review of his order of deportation. *See* 8 U.S.C. § 1252(a)(2)(D) (2001), *amended by* REAL ID Act § 106(a)(1)(A)(iii), Pub. L. No. 109-13, Div. B, 119 Stat. 302, 310 (2005). Recent changes in the law benefit Elia: the REAL ID Act both places Elia's petition for review of his *deportation* order under the set of judicial review rules applicable to *removal* cases, and also expands this court's direct review of removal orders. Nonetheless, because Elia argues no persuasive legal ground for vacating his deportation order, we deny the petition for review.

Where, as here, the BIA summarily affirms an IJ's order of deportation, this court directly reviews the IJ's decision. *See Denko v. INS,* 351 F.3d 717, 730 (6th Cir. 2003). This court reviews de novo Elia's constitutional challenges to the IJ's denial of § 212(c) relief. *Mikhailevitch v. INS*, 146 F.3d 384, 391 (6th Cir. 1998).

INA § 106, 8 U.S.C. § 1105a (1994), originally provided the procedure allowing aliens to petition for judicial review of

a final order of deportation.[3] See *Pak v. Reno*, 196 F.3d 666, 670 n.4 (6th Cir. 1999). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") repealed INA § 106. IIRIRA § 306(b), Pub. L. No. 104-208, Div. C, tit. III, 110 Stat. 3009 (1996) (codified at Historical and Statutory Notes, 8 U.S.C. § 1101 (2001)). IIRIRA created "transitional rules" narrowing court jurisdiction to review deportation orders entered after October 30, 1996, in proceedings commenced before the effective date of the permanent amendments, April 1, 1997. *See* IIRIRA § 309(c)(4) (transitional rules); *id.* § 309(a) and (c)(1) (transitional rules apply to deportation proceedings pending on [April 1, 1997]); *id.* § 309(c)(4) (transitional rules apply to cases in which final order of deportation is entered [after October 30, 1996]); *see also Pilica v. Ashcroft*, 388 F.3d 941, 947 n.4 (6th Cir. 2004) (defining "transitional rules" cases). At the same time, IIRIRA created the "removal" proceeding.[4] IIRIRA also amended INA § 242, 8 U.S.C. § 1252, to impose new permanent rules restricting review of final orders of removal. *See* 8 U.S.C. § 1252(a) (2001). Like the transitional rules, these new rules are more restrictive of judicial review

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[3] The former § 1105a(c), INA § 106(c), provided that an order of deportation "shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations . . . ." 8 U.S.C. § 1105a(c) (1994), *repealed by* IIRIRA § 306(b), Pub. L. No. 104-208, Div. C, tit. III, 110 Stat. 3009 (1996).

[4] Through removal, IIRIRA fused two previously distinct expulsion proceedings, deportation and exclusion. *Jama v. Imm. & Customs Enforcement*, 160 L. Ed. 2d 708, __ U.S. __, 125 S. Ct. 694, 704 (2005). Expulsion proceedings initiated after the April 1, 1997 effective date are removal proceedings.

than the former INA § 106. On May 11, 2005, Congress enacted the REAL ID Act, which provides:

> A petition for review filed under former section 106(a) of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . .) shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by this section.

REAL ID Act § 106(d), 119 Stat. 310-311 (effective on date of enactment). Petitions for review in "transitional rules" cases are filed under the procedure created by the former section 106(a). *See Pak*, 196 F.3d at 670 n.4. Therefore, the REAL ID Act effectively subjects orders of deportation in "transitional rules" cases to the same rules of judicial review, 8 U.S.C. § 1252(a), as apply to removal orders.

Since deportation proceedings against Elia were commenced before April 1, 1997, and the final order of deportation was entered after October 30, 1996, his is a "transitional rules" case. Because of the REAL ID Act amendments, 8 U.S.C. § 1252 now determines whether this court has jurisdiction to review the final order of deportation in Elia's case.

Further, the REAL ID Act's amendments to 8 U.S.C. § 1252 give us jurisdiction to review Elia's claims. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), bars courts from reviewing any final order of removal against an alien who is removable by virtue of, inter alia, having been convicted of an aggravated felony. Elia was found deportable on this basis. However, 8 U.S.C. § 1252(a)(2)(D), as amended by REAL

ID Act § 106(a)(1)(A)(iii), 119 Stat. 310, provides that § 1252(a)(2)(C) "shall [not] be construed as precluding review of constitutional claims or questions of law raised upon a petition for review . . . ."[5] Elia raises legal, rather than

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[5] In *Calcano-Martinez v. INS*, 533 U.S. 348, 150 L. Ed. 2d 392, 121 S. Ct. 2268 (2001), the Supreme Court held that § 1252(a)(2)(C) barred direct review of the BIA's denial of § 212(c) relief to petitioners convicted of aggravated felonies, where the petitioners conceded that they were removable but disputed the BIA's findings on § 212(c) eligibility. *Id.* at 349-50. The Court stated, "Leaving aliens without a forum for adjudicating claims such as those raised in this case would raise serious constitutional questions." *Id.* at 351. The Court noted, however, that it had found in *INS v. St. Cyr*, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001), that petitioners could seek review of removal orders in this situation through petitions for habeas corpus. *Calcano-Martinez*, 533 U.S. at 351. *Calcano-Martinez* suggested that habeas corpus should be the primary vehicle of review when an alien removable by reason of having been convicted of an aggravated felony, objects to an order of removal on the grounds that the alien was actually eligible for § 212(c) relief.

Through the REAL ID Act, Congress amended § 1252 to change this state of affairs. The new § 1252(a)(2)(D) restores direct review of constitutional and legal grounds for objecting to an order of deportation or removal against an aggravated felon; however, the REAL ID Act amendments limit habeas relief. *See* 8 U.S.C. § 1252(a)(5) and (e) (petitions for review sole means for judicial review of removal orders, save for limited habeas review of expedited removal orders); REAL ID Act § 106(d), 119 Stat. 311 (petitions for review sole means of judicial review of transitional rule deportation cases, treated effectively as removal cases under the new scheme). The new § 1252(a)(2)(D) therefore appears to abrogate this court's decisions in *Patel v. Ashcroft*, 401 F.3d 400, 406 (6th Cir. 2005), *Pulice v. INS*, 218 F.3d 505, 507-508 (6th Cir. 2000), and *Mansour v. INS*, 123 F.3d 423, 425-426 (6th Cir.

factual, arguments concerning his eligibility for § 212(c) relief.

In order to qualify for relief under the former § 212(c), an applicant must be a lawful permanent resident of the United States, and must have been domiciled in the United States for seven consecutive years. 8 U.S.C. § 1182(c) (1994), *repealed by* IIRIRA § 304(b), 110 Stat. 3009; 8 C.F.R. § 212.3(f)(2) (2004) (barring § 212(c) relief for aliens who have not met these requirements). The relief is at the Attorney General's discretion. 8 U.S.C. § 1182(c) (1994). Aliens convicted of one or more aggravated felonies, who have served a term of imprisonment of at least five years, are ineligible for § 212(c) relief. *Id.*; 8 C.F.R. § 212.3(f)(4).[6] While the former § 212(c) explicitly applied only to respondents in exclusion proceedings, courts have construed it as providing relief to

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1997), which held that, when an alien is removable by reason of conviction of an aggravated felony, this court does not have jurisdiction to review constitutional claims on petition for review of a removal or deportation order.

[6] As noted above, AEDPA eliminated § 212(c) relief for all aggravated felons, regardless of the term of imprisonment they served for their conviction. AEDPA § 440(d), Pub. L. No. 104-132, tit. IV, 110 Stat. 1214 (1996) (amending 8 U.S.C. § 1182(c) to bar § 212(c) relief for aggravated felons, among others). However, this court in *Pak*, 196 F.3d at 676, held that AEDPA § 440(d) does not apply to deportation cases pending when AEDPA was enacted on April 24, 1996. As of April 1, 1997, IIRIRA repealed § 212(c), replacing it with a new form of relief called "cancellation of removal," 8 U.S.C. § 1229b, which also barred aggravated felons from eligibility. *St. Cyr*, 533 U.S. at 297. Because Elia's deportation case was pending on April 24, 1996, he would be eligible for § 212(c) relief if he could demonstrate that he served a term of imprisonment of less than five years.

aliens facing orders of deportation, as well. *INS v. St. Cyr*, 533 U.S. 289, 295, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001).

Elia contests the denial of § 212(c) relief on three grounds. At oral argument, Elia waived his fact-based argument that he served three days short of a five-year sentence and therefore was not statutorily ineligible for § 212(c) relief. Nevertheless, he argues, this court should deem him to have served only a two-year sentence, because the Michigan Court of Appeals' ultimately incorrect decision to reverse Elia's original two-to-twenty-year sentence caused Elia to "serve an 'improper' sentence of . . . three years longer than he should have." Petitioner's Br. at 15. Second, Elia argues that the Government failed to schedule a prompt deportation hearing. This delay, combined with the appeals court ruling that caused Elia to serve a five-year term, ensured that Elia would be denied § 212(c) relief. Elia argues that the Government's delay amounted to a violation of substantive and procedural due process, equal protection, and the Eighth Amendment's prohibition of cruel and unusual punishment. Third, Elia contends, equitable estoppel and the defense of laches should prevent the Government from benefitting from its delay in scheduling Elia's deportation hearing. All three grounds lack merit.

Elia requests that this court "interpret the language of 8 C.F.R. § 212.3(f)(4) in a manner so that the term of imprisonment for [Elia's] conviction was only two years, even though he served more time," because Elia was ultimately resentenced to a two-to-twenty-year term of imprisonment, rather than a five-to-twenty-year term. Petitioner's Br. at 5. This argument is unavailing. Determining whether imprisonment has made an alien ineligible for § 212(c) relief "turns not on the sentence imposed but on the period of actual

incarceration." *United States v. Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001). In his brief, Elia provides no legal support for his assertion that the court should deem him to have served only a two-year term.[7] Parole is discretionary in Michigan. Mich. Comp. Laws § 791.234(9) (2004). There is no reason to assume that Elia would have been paroled after only two years had Elia's original two-to-twenty-year term remained in effect throughout his incarceration.[8] Deeming Elia to have served a

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[7] At oral argument, Elia urged that this court should follow *Edwards v. INS*, 393 F.3d 299 (2d Cir. 2004), to reach this result. However, *Edwards* would not support our deeming Elia to have served a two-year term. In *Edwards*, the Second Circuit granted *nunc pro tunc* relief to two aliens who had erroneously been denied the opportunity to apply for § 212(c) relief. Both petitioners, like Elia, had been denied § 212(c) relief before the Supreme Court determined that AEDPA's bar on § 212(c) relief for aggravated felons did not apply retroactively. Unlike Elia, however, the petitioners in *Edwards* had not served five years' imprisonment at the time the IJ originally denied § 212(c) relief based on AEDPA. *Id.* at 304. "When a matter is adjudicated *nunc pro tunc*, it is as if it were done as of the time that it should have been done." *Id.* at 308. Here, the fact that Elia's § 212(c) application was once denied, incorrectly, on AEDPA-based grounds, had no relationship to the subsequent finding that Elia was ineligible because of having served five years in prison; the IJ could have rejected Elia's claim on the latter basis initially. Thus, *nunc pro tunc* relief is inapplicable here. Elia's real complaint is that the Government delayed too long between service of the OSC and scheduling a deportation hearing.

[8] There is some indication that Elia was not from the outset a model prisoner: he was disciplined for possession of dangerous contraband shortly after his prison sentence began. Factors such as this may have prevented him from serving only the minimum within his sentence range.

two-year sentence for purposes of § 212(c) eligibility would disregard this reality.

In addition, Elia's constitutional challenges to the denial of § 212(c) relief appear meritless. Elia argues that the Government abridged a fundamental liberty interest, in violation of substantive due process, by failing to grant Elia a deportation hearing until five years after the service of an OSC on Elia. Petitioner's Br. at 21. No authority supports Elia's contention that a speedy deportation hearing constitutes a fundamental right implicating substantive due process.

Elia's claim of a procedural due process violation also fails. While procedural due process rights extend to deportation hearings, the alien must meet the high standard of proving that a defect in deportation proceedings constituted fundamental unfairness. *See Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001). Other courts have soundly reasoned that the Government's delay in scheduling a deportation hearing after issuing an OSC does not violate due process, even if an intervening change in the law deprives an alien of eligibility for discretionary relief from deportation. *See Clavis v. Ashcroft*, 281 F. Supp. 2d 490, 496-497 (E.D.N.Y. 2003) (finding no due process violation where deportation proceedings were administratively closed in order for alien to pursue criminal appeal, and reopened only after alien was statutorily barred from § 212(c) relief); *Marmolejos v. INS*, 1995 U.S. App. LEXIS 31034, No. 95-1728, 1995 WL 639649 (1st Cir., Oct. 31, 1995) (holding that where, as here, alien was foreclosed from § 212(c) relief because the Government issued OSC before the alien had served five years' imprisonment, but held a deportation hearing only after, the alien did not have a due process right to a timely hearing); *Lopez-Moreno v. INS*, 2002 U.S. Dist. LEXIS 18489, No. 00-2928, 2002 WL 31133097 (N.D. Ill. Jul. 16,

2002) (same); *cf. DiPeppe v. Quarantillo*, 337 F.3d 326, 333-334 (3d Cir. 2003) (holding in habeas case, where alien was convicted in 1992 but Government initiated removal proceedings only in 2000, when alien was automatically ineligible for § 212(c) relief by virtue of conviction for an aggravated felony, that the Government's delay in initiating removal proceedings did not violate due process); *but see Singh v. Reno*, 182 F.3d 504, 510-511 (7th Cir. 1999) (granting alien's petition for review, finding colorable due process claim because INS delays, including administratively closing deportation proceedings and rescheduling deportation hearing, resulted in alien's being statutorily barred from pursuing § 212(c) relief). It is true that the Immigration and Nationality Act provides, "In the case of an alien who is convicted of an offense that makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction." 8 U.S.C. § 1229(d)(1). However, this subsection does not "create any substantive or procedural right . . . ." *Id.* § 1229(d)(2); *see DiPeppe*, 337 F.3d 326 at 333-334 (holding that § 1229(d)(2) "fatally undermines" an argument that § 1229(d)(1) creates a procedural right). In any event, § 1229(d)(1) does not directly bear on any delay in scheduling a hearing in a deportation proceeding that has previously been timely initiated; deportation and removal proceedings "commence . . . when a charging document [such as an OSC] is filed with the Immigration Court," not when the Immigration Judge holds a hearing. 8 C.F.R. § 1003.14(a). The cases cited above correctly conclude that this delay does not violate any property or liberty right protected by the Due Process Clause.

Elia's claim of a denial of equal protection also fails, because his brief does not identify any classification the Government made, in denying him § 212(c) relief, that was

not rationally related to a legitimate governmental purpose. *See Asad v. Reno*, 242 F.3d 702, 706 (6th Cir. 2001). Finally, Elia's claim that his deportation constitutes cruel and unusual punishment lacks merit; the Eighth Amendment is inapplicable to deportation proceedings because, as the Supreme Court has held, deportation does not constitute punishment. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039, 82 L. Ed. 2d 778, 104 S. Ct. 3479 (1984).

Elia's equity-based arguments for opposing the denial of § 212(c) relief also lack merit. Elia argues that he orally requested § 212(c) relief when he was served with the OSC in 1991. He contends that the INS, with the purpose of rendering Elia statutorily ineligible for the relief, impermissibly delayed a deportation hearing in Elia's case. Neither the defense of laches nor the doctrine of equitable estoppel applies. The defense of laches, an equitable doctrine of uncertain relevance here, requires a showing of the plaintiff's "neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity." *Kansas v. Colorado*, 514 U.S. 673, 687, 131 L. Ed. 2d 759, 115 S. Ct. 1733 (1995) (quoting Black's Law Dictionary 875 (6th ed. 1990)). Elia fails to prove that the INS exhibited neglectful delay, in violation of any law or regulation, by holding Elia's deportation hearing when it did.

Finally, there is no basis for equitable estoppel in this case. Without ever so holding, the Supreme Court has left open the possibility that a claim of equitable estoppel may lie against a federal government agency for misleading statements or actions that a private party relies upon, where the agency commits "affirmative misconduct" causing the denial of a benefit. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421-423, 110 L. Ed. 2d 387, 110 S. Ct. 2465 (1990). In

the context of an estoppel claim against the government, "affirmative misconduct is more than mere negligence. It is an act by the government that either intentionally or recklessly misleads the claimant." *Estate of James v. United States Dep't of Agric.*, 404 F.3d 989, 995 (6th Cir. 2005) (quoting *Mich. Express, Inc., v. United States*, 374 F.3d 424, 427 (6th Cir. 2004)). Further, the claimant must have relied on the misrepresentation to his detriment. *Id.* It is unclear how Elia relied on the INS delay in hearing the deportation case. In any event, the Government's conduct here clearly does not sink to the level of "affirmative misconduct." In *INS v. Miranda*, 459 U.S. 14, 18, 74 L. Ed. 2d 12, 103 S. Ct. 281 (1982), for instance, when the INS failed to act on a visa application for eighteen months, the agency's failure to act expeditiously did not amount to affirmative misconduct estopping the Government from denying the alien's application. Elia fails to demonstrate that the Government misled him, or that his reliance caused him to lose the benefit of § 212(c) relief.

For the foregoing reasons, we deny the petition for review.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 03-3446

[Filed July 22, 2005]

JAWDAT ELIA	)
Petitioner,	)
	)
v.	)
	)
ALBERTO GONZALES	)
Attorney General,	)
Respondent.	)
	)

JUDGMENT

Before: SILER and ROGERS, Circuit Judges; REEVES, District Judge.

THIS MATTER came before the court upon the petition of Jawdat Elia to review an order of the Board of Immigration Appeals.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED that the petition by Jawdat Elia for review of the order issued by the Board of Immigration Appeals in this matter be DENIED.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review

Case No. A35-087-043

[Filed February 25, 2003]

In the Matter of:	)	
JAWAT ELIA,	)	In Deportation Proceedings
Respondent	)	
	)	

ORDER OF THE BOARD OF IMMIGRATION APPEALS

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

/s/ _____
Edward R. Gras
FOR THE BOARD

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review

Case No. A 35-087-043

[Filed October 11, 2001]

In the Matter of:	)	
JAWAT ELIA,	)	In Deportation Proceedings
Respondent	)	
	)	

ORAL DECISION OF THE IMMIGRATION JUDGE

Charges:

Section 241(a) (2) (A) (3) (I) of the Immigration and Nationality Act, as amended - an alien who is convicted of an aggravated felony as defined in Section 101 (a) (43) of the Immigration and Nationality Act after entry; and

Applications:

Section 241(a) (2) (B) (I) of the Immigration and Nationality Act, as amended - an alien who after entry has been convicted of a violation of any law or regulation of a state, the United States, or a foreign country relating to a controlled substance, as defined in Section 102 of the

Controlled Substances Act, (21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

Section 212 (c) of the Immigration and Nationality Act, as amended waiver of excludability.

DECISION

The respondent is a 31-year-old male, single native and citizen of Iraq. The Immigration and Naturalizaticn Service (hereinafter "the Service") issued an Order to Show Cause charging the respondent with deportability as set forth above through the instant proceedings with commencement of the filing of the Order to Show Cause with the Immigration Court. See Exhibit 1, 8 C.F.R. 3.14(a). A hearing was initially held before the Immigration Court on the respondent's application for consideration of relief under Section 212(c) of the Immigration and Nationality Act (hereinafter "the Act").

However, at the time the respondent was brought before the Court, the Board had issued its decision in Matter of Soriano, and the application for relief under Section 212 (c) was denied.

An appeal was taken to the Board of Immigration Appeals on the respondent's applications for relief under Section 212(c). Following a decision of the Sixth Circuit Court of Appeals in Pak v. Reno, 196 F.3d 666 (6th Circuit, 1999), which found that the restrictions on Section 212 (c} added by the Antiterrorist and Effective Death Penalty Act of 1996, Public Law no. 104-132, 110 statutes 1214 ("AEDPA") do not apply retroactively to proceedings commenced on or before April 24, 1996. Since this case arose in the Sixth

Circuit, the respondent did fall within the scope of Pak v. Reno and the record was remanded. See decision of the Board of Immigration Appeals, June 22, 2000.

Pursuant to the remand before the Board of Immigration Appeals, the case was scheduled for a hearing. At hearing, the respondent submitted some additional documents in support of his application for relief under Section 212(c) , including an updated application. See Exhibit 3.

Prior to taking significant testimony in this matter, the Service has raised a significant issue as to the respondent's statutory eligibility for the relief under Section 212(c). Service notes and, as is confirmed on the respondent's application, see Exhibit 3, the respondent was apparently incarcerated from June 26, 1991 until October 1, 1996, pursuant to his conviction for delivery/manufacture of a narcotic between 50 to 224 grams of cocaine. See Exhibits 2A and 9.

The respondent argues that although his original conviction, which was entered on June 28 of 1991, sentenced him to a minimum of two years and a maximum of twenty years for violation of Michigan compiled laws Section 333.7403283 for violation of the statute, that decision was appealed to the Michigan Court of Appeals which found that the Trial Judge Deborah Tyner erred in sentencing the respondent to a minimum sentence of two years when the state's statutory minimum sentence required five years. The Court of Appeals apparently reversed the decision of Judge Tyner and a new sentence, indeterminant sentence from 5 to 20 years was entered.[1]

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[1] No copy of the Order of the Court of Appeals reversing the Trial Court has been submitted in this case. Nevertheless, Court takes the statement made by counsel to represent the actions of the Court

Counsel for the respondent argues that a subsequent decision of the Michigan Supreme Court reversed the effect of the Court of Appeals decision in respondent's case. This was a decision of the Supreme Court in State v. Fields, which found that a trial judge could depart from mandatory minimums where good cause was found. The respondent argues that on April 18, 1997, pursuant to this decision in State v. Fields, Judge Tyner entered a new sentence. See Exhibit 9. Respondent, in that new sentence on April 18, 1997, was sentenced to a minimum sentence of two years with a maximum sentence of 20 years for a violation of 323.7401283, that is, delivery/manufacture of a controlled substance count 2. See Exhibit 9.

The respondent was given credit in that judgment for having served 1,922 days of the sentence.

As pointed out by counsel for the Government, the amended sentence of April 18, 1997 is an indeterminate sentence. The respondent was sentenced from 2 to 20 years. He was given credit for 1,922 days or 5 years and 93-some days. The Board precedent in the case of an indeterminate sentence is clear. Where a respondent is sentenced to an indeterminate sentence by a state criminal court, for immigration purposes, the sentence to which the respondent was sentenced is the maximum term imposed by the sentencing court. In both cases submitted to the Court, that is, the sentence of June 28th,[2] the sentence imposed on this date

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of Appeals.

[2] The initial sentence in this Court was amended by issuance of a notation, Exhibit 2F, to reflect that the actual commencement of sentence in this case was commenced on June 26 of 1991 so that the respondent obtained credit for two days served in the State

was a minimum of 2 years and maximum of 20 years. The intermediate sentence imposed arguably by the Court of Appeals was 5 to 20 years, and the sentence of April 18, 1997 was again 2 to 20. For immigration purposes, all of these sentences are considered to be sentences of the maximum term imposed, that is, 20 years. The respondent's eligibility for relief under Section 212(c) requires the respondent to establish seven years of continuous permanent residence in the United States, and as well as showing that he merits the exercise of the Court's discretion. Matter of Marin, 69 I&N Dec. 581 {BIA 1978). However, as a matter of statute, the waiver is not available to an individual who was convicted of an aggravated felony and was actually incarcerated for five years or more during (including convictions when aggregated) as long as the time served was for aggravated felonies. See Section 212(c) of the Act, 8 C.F.R. 212.3(f)(4). In the instant case, the respondent argues that he did not serve five years. The respondent's argument is apparently premised upon the recommended parole by the Michigan Parole Board. See Exhibit 11. This document, which shows a mailing date of May 24, 1996, shows that the respondent was given a projected parole date of June 25, 1996. The respondent has also submitted additional documents, see Group Exhibit 14, which in response to a second step grievance response, it is noted that a correction was made to the parole reflecting a parole release date of July 18, 1996. That response goes on to note that the Immigration Service had been notified on two occasions that the respondent was available to be taken pursuant to an immigration detainer. However, it clearly notes that the Immigration Service, at least according to the Michigan Training Unit, had "90 days to get you." See Exhibit 14.

Correctional System.

The respondent was released to the custody of the Immigration and Naturalization Service on October 2, 1996 pursuant to a warrant for arrest. See Exhibit 15. This is confirmed by a note from the records officer supervisor showing that the respondent was, in fact, paroled from custody on October 1, 1996 and was released on that date or the parole was effective on that date for a period of 24 months. See Exhibit 8.

Counsel argues that the respondent should not be prejudiced by the failure of the Immigration and Naturalization Service to take him into custody on the projected parole date. However, as noted by government counsel, even assuming for the sake of argument, that the respondent was taken into custody on the projected parole date, the respondent would still have served 5 years of a maximum sentence of 20 years in a state correctional facility. The documentary evidence in this case clearly establishes that that first parole date, as is not uncommon in parole situations, was a projected parole date and was amended by the parole board to reflect an earliest release date of July 18, 1996, and in fact, the respondent was not released on parole by the state correctional facility until October 1, 1996, a period of some five years and two months.

The respondent in this case has served five years in a correctional facility. Given the most favorably projected release date, respondent would still have served five years on his sentence. He, in fact, served in excess of five years. The statute is clear. The conviction record is clear. The respondent has served five years in a state correctional facility for an aggravated felony. As a matter of law, the respondent is not statutorily eligible for the relief of 212(c). The Court would note that the calculations in this matter are certainly within the record, however, it must further be noted that given the

amendments as well as the now complete record showing the actual parole date with the resentencing and other documents including the referenced extension of parole to July 18. That the record now is amply clear for purpose of review by the Board. That the respondent did, in fact, serve five years and is statutorily ineligible for the relief of 212(c).

Based on the forgoing and after having considered the evidence of record in this matter the following order will be entered.

ORDER

IT IS ORDERED that the respondent's application for waiver under Section 212(c) of the Act is denied, and the respondent is ordered deported to Iraq on the charges contained in the Order to Show Cause.

/s/ _____
ELIZABETH A. HACKER
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE ELIZABETH A. HACKER, in the matter of:

JAWDAT ELIA

A-35-087-043

Detroit, Michigan

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ _____
Julie W. Holloman, Transcriber

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U.S. Department of Justice
Executive Office for Immigration Review

Case No. A 35 087 043

[Filed October 11, 2001]

In the Matter of:	)
JAWAT ELIA,	)
Respondent	)
	)

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 10/17/01.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

The respondent was ordered deported to Iraq.

Respondent's application for waiver under Section 212(c)of the Immigration and Nationality Act was ( ) granted (x) denied ( ) withdrawn ( ) other.

/s/
Elizabeth A. Hacker
Immigration Judge
Date: 10/11/01

Appeal 11/13/01

(2)

No. 05-849

In the Supreme Court of the United States

JAWDAT ELIA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated because the Immigration and Naturalization Service served him with an order to show cause charging him with deportability in December 1991, soon after he began serving a criminal sentence, but did not schedule his deportation hearing until October 1996, soon after he was released from prison.

2. Whether, despite the fact that petitioner served more than five years in prison, he should be deemed to have served less than five years in prison for purposes of determining his eligibility for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994) (repealed 1996), because, after his release from prison, his sentence was reduced from 5 to 20 years to 2 to 20 years.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulation and rule:

Statutes, regulation and rule—Continued: Page

In the Supreme Court of the United States

No. 05-849

JAWDAT ELIA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 431 F.3d 268. The order of the Board of Immigration Appeals (Pet. App. 37a) and the decision of the immigration judge (Pet. App. 38a-45a) are unreported. The superseded opinion of the court of appeals (Pet. App. 20a-34a) is reported at 418 F.3d 667.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35a-36a) was entered on July 22, 2005, and amended on October 24, 2005 (Pet. App. 16a). A petition for rehearing was denied on September 29, 2005 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on December 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply to deportation proceedings as well. See *INS* v. *St Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. See Pub. L. No. 101-649, § 511, 104 Stat. 5052. Subsequently, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony, without regard to the amount of time spent in prison. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes aggravated felons ineligible for discretionary relief. See 8 U.S.C. 1229b(a)(3).

2. Petitioner is a native and citizen of Iraq. Pet. App. 39a. In April 1991, after having become a lawful permanent resident, he pleaded guilty in a Michigan court to delivery of a controlled substance, in violation

of Mich. Comp. Laws Ann. § 333.7401(2)(a)(iii) (West 1991). Pet. App. 1a-2a & n.1. In June 1991, he was sentenced to a prison term of 2 to 20 years. *Id.* at 2a. The State appealed the sentence. *Id.* at 3a.

In December 1991, while petitioner was serving his sentence, and while the State's appeal was pending, the Immigration and Naturalization Service (INS) served petitioner with an order to show cause. Pet. App. 3a.[1] The INS alleged that petitioner was deportable because of his conviction of the drug offense, which is an aggravated felony (see 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii)). Pet. App. 3a.

In September 1992, the Michigan Court of Appeals remanded the criminal case for resentencing, on the ground that the statutory minimum was five years and the trial court did not have discretion to impose a sentence below the statutory minimum. Pet. App. 3a. On remand, petitioner was resentenced to a prison term of 5 to 20 years. *Ibid.* In March 1995, in *People* v. *Fields*, 528 N.W.2d 176, the Michigan Supreme Court held that a sentence below the five-year statutory minimum is permissible in some circumstances. In October 1996, after serving more than five years in prison, petitioner was released on parole and taken into INS custody. Pet. App. 3a & n.2.

3. Later in October 1996, petitioner appeared before an immigration judge (IJ) and requested discretionary relief from deportation under Section 212(c) of the INA.

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[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

Pet. App. 4a.[2] The IJ ruled that petitioner was ineligible for such relief and entered an order of deportation. *Ibid.* The IJ reasoned that AEDPA had eliminated the availability of Section 212(c) relief to any alien convicted of an aggravated felony and that the applicable provision applied to aliens convicted before AEDPA's effective date. *Ibid.*

In the meantime, petitioner had filed a motion in the state trial court to have his criminal sentence modified in light of the Michigan Supreme Court's decision in *Fields*. Pet. App. 4a. In April 1997, the trial court reinstated petitioner's initial sentence of 2 to 20 years. *Ibid.* He was given credit for the time he had already served, which was approximately five years and 93 days. *Id.* at 41a.

In July 1997, the Board of Immigration Appeals (BIA) affirmed the IJ's order of deportation. Pet. App. 4a.

4. Petitioner subsequently moved to reopen the deportation proceedings. Pet. App. 4a. The BIA granted the motion, on the basis of a 1999 Sixth Circuit decision, *Pak* v. *Reno*, 196 F.3d 666, that prohibited the application of AEDPA's amendment of Section 212(c) in cases pending on the statute's effective date. Pet. App. 4a. On remand from the BIA, an IJ ruled that petitioner was ineligible for relief under the pre-AEDPA (*i.e.*, 1990) version of Section 212(c), because he had served at least five years in prison, and again entered an order of de-

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[2] Petitioner asserts (Pet. 8, 12, 16 n.10, 17) that he orally requested Section 212(c) relief from an INS officer who visited him in the state prison shortly before he was served with the order to show cause in December 1991. The court below found, however, that "nothing in the record supports this claim." Pet. App. 3a.

portation. *Id.* at 38a-45a. The BIA affirmed without opinion. *Id.* at 37a.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-15a.

a. The court of appeals rejected petitioner's contention that, because the Michigan trial court ultimately reinstated the sentence of 2 to 20 years, he should be deemed to have served a sentence of only two years. Pet. App. 10a-11a. The court explained that "[d]etermining whether imprisonment has made an alien ineligible for § 212(c) relief 'turns not on the sentence imposed but on the period of actual incarceration.'" *Id.* at 10a (quoting *United States* v. *Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001)). The court went on to say that "[p]arole is discretionary" in Michigan, and "[t]here is no reason to assume that [petitioner] would have been paroled after only two years had [his] original two-to-twenty-year term remained in effect throughout his incarceration." *Id.* at 11a. Indeed, since "[t]here is some indication that [he] was not from the outset a model prisoner," the court suggested that it might be more appropriate to assume that petitioner would *not* have served "only the minimum within his sentence range." *Id.* at 11a n.8.

b. The court of appeals also rejected petitioner's contention that his due process rights were violated by the lapse of time between the service of the order to show cause and the scheduling of a deportation hearing. Pet. App. 12a-13a. The court relied on decisions of other courts that "soundly reasoned that the Government's delay in scheduling a deportation hearing after issuing

an [order to show cause] does not violate due process." *Id.* at 12a (citing cases).[3]

ARGUMENT

1. Petitioner contends (Pet. 10-18) that his due process rights were violated because the INS served the order to show cause in December 1991, soon after he began serving his state criminal sentence, but did not schedule his deportation hearing until October 1996, soon after he was released from prison. The court of appeals correctly held otherwise, and its decision does not conflict with any decision of any other court. Further review is therefore unwarranted.

a. At bottom, petitioner is asserting a type of "speedy trial" claim. Pet. 16. It is not clear, however, why the Due Process Clause should be thought to have anything to say about how soon a hearing must be held after an order to show cause is served. In the criminal context, where a defendant is afforded greater protections than an alien in the immigration context, the question of how soon a trial must be held after the filing of charges is governed, not by the Due Process Clause, but by the Speedy Trial Clause of the Sixth Amendment and, in the federal system, by the Speedy Trial Act of 1974, 18 U.S.C. 3161-3174. The fact that there is no analogous constitutional or statutory provision applicable to deportation proceedings suggests that the govern-

[3] The court of appeals also rejected petitioner's contention that the delay in scheduling a deportation hearing violated his equal protection and Eighth Amendment rights, Pet. App. 13a-14a, and his contention that the doctrines of equitable estoppel and laches should prevent the government from benefitting from the delay, *id.* at 14a-15a. Petitioner does not renew those contentions in this Court.

ment does not have an obligation to hold a hearing within any particular period.

While petitioner's claim is one of procedural due process, moreover, see Pet. 8, 10, 17, 18, he fails to identify the liberty or property interest of which he has assertedly been deprived. See *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Fifth or] Fourteenth Amendment's protection of liberty and property."). Petitioner was in state, not INS, custody from December 1991, when the order to show cause was served, until he was released on parole in October 1996, shortly before his first deportation hearing was scheduled. The lapse of time between the service of the order to show cause and the hearing thus did not have any effect on petitioner's liberty during that period. Insofar as petitioner's claim is that he had a constitutionally protected interest in discretionary relief from deportation under Section 212(c) during that time, that claim is equally without merit. "[B]ecause discretionary relief is necessarily a matter of grace rather than of right, aliens do not have a due process liberty interest in consideration for such relief." *United States* v. *Torres*, 383 F.3d 92, 104 (3d Cir. 2004). Accord, *e.g.*, *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005); *Ali* v. *Ashcroft*, 366 F.3d 407, 412 (6th Cir. 2004); *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004); *United States* v. *Wilson*, 316 F.3d 506, 510 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003); *Oguejiofor* v. *Attorney General*, 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam).

b. Petitioner contends (Pet. 10) that the INS violated his due process rights by failing to comply with the requirement of 8 U.S.C. 1229(d)(1) that, "[i]n the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction." But 8 U.S.C. 1229(d)(2) explicitly states that "[n]othing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." The provision was enacted for the benefit of the public, not aliens, to bring about the prompt removal of those who have been convicted of criminal offenses. And petitioner would not have been deported in any event while he was still serving his state sentence.

Petitioner also relies (Pet. 14) on a regulation proposed in 1992, but never adopted, that would have required, in a case in which the alien was deportable by virtue of having been convicted of an aggravated felony, that the hearing be "scheduled and completed within 30 days after the commencement of proceedings." 57 Fed. Reg. 61,587. A regulation that was never adopted, however, provides no basis for a due process claim. In any event, petitioner's hearing *was* scheduled and completed within 30 days after the commencement of proceedings. His deportation proceeding was commenced, not by the *service* of the order to show cause, but "by the filing of [the] order to show cause with the Immigration Court," 8 C.F.R. 242.1(a) (1996), and the order to show cause was filed on October 9, 1996, Admin. R. 500-503. The deportation hearing was completed 16 days later, on October 25, 1996. *Id.* at 342-353.

Citing *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), petitioner contends that the Due Process Clause requires that a deportation hearing be held within a "reasonable time" of the service of an order to show cause, and that the nearly five years that separated those events in this case is not a "reasonable time." Pet. 13. Petitioner's reliance on *Zadvydas* is misplaced. In that case, this Court applied the canon of constitutional avoidance and construed a statute authorizing the detention of aliens in certain circumstances to contain an implicit "reasonable time" limitation. 533 U.S. at 688-701. In construing the statute in that manner, the Court recognized that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects." *Id.* at 690. This case does not involve the right to be free from imprisonment—during the period at issue, petitioner was serving a lawfully imposed criminal sentence—but rather an asserted right to a hearing shortly after service of an order to show cause, even though the mere service of the order did not actually commence the proceedings against petitioner (see p. 8, *supra*), and even though he could not have been deported at that time.[4]

Petitioner also relies (Pet. 16-17) on *INS* v. *St. Cyr*, 533 U.S. 289 (2001), but that case, too, has no applicability here. *St. Cyr* involved AEDPA's amendment of Section 212(c) to make ineligible for discretionary relief from deportation any alien previously convicted of an aggravated felony, without regard to the amount of time spent in prison. The Court held that it would be

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[4] Petitioner also cites (Pet. 13) *Reno* v. *Flores*, 507 U.S. 292, 314-315 (1993), but that case, too, involved detention.

impermissibly retroactive to apply the amendment to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. As petitioner acknowledges, there is no "retroactive statute at issue here." Pet. 16. Petitioner pleaded guilty to an aggravated felony in 1991, Pet. App. 2a, and it was the 1990 version of Section 212(c)—not the 1996 version—that was applied at his deportation hearing. Petitioner was ineligible for discretionary relief from removal, not because of a statute enacted after his plea, but because of a failure to satisfy the eligibility criteria of the statute in effect when his plea was entered.

c. Petitioner contends (Pet. 10-13) that the court of appeals' decision on the due process issue conflicts with the Seventh Circuit's decision in *Singh* v. *Reno*, 182 F.3d 504 (1999). That is not correct.

In *Singh*, the INS issued an order to show cause in October 1992 and did not schedule a deportation hearing until late 1996, by which time the alien (Singh) no longer had a right to apply for discretionary relief from deportation. 182 F.3d at 510. The Seventh Circuit did not take issue with the "abstract" proposition that "an alien has no substantive right to have a claim heard at a particular time," but held that Singh had stated a due process claim in "the very unusual circumstance" of that case—in particular, the circumstance that it was "Singh rather than the INS pressing for the resolution of Singh's status." *Ibid.* Indeed, the court found the fact that "it was Singh who pressed to have the matter resolved" to be "of crucial significance." *Id.* at 511.

The "very unusual" and "crucial[ly] significan[t]" fact that was present in *Singh* is not present here, because, unlike Singh, petitioner did not ask that his deportation

hearing be scheduled or otherwise "press[] for the resolution of [his] status." 182 F.3d at 510-511. Petitioner repeatedly asserts (Pet. 8, 12, 16 n.10, 17) that he orally requested Section 212(c) relief from an INS officer shortly before he was served with the order to show cause, but the court below correctly found that "nothing in the record supports this claim" (Pet. App. 3a).

The Seventh Circuit itself has decided that the holding of *Singh* does not apply when, as in this case, the alien did not "press[] for the resolution of [his] status." 182 F.3d at 510. See *Patel* v. *Gonzales*, No. 04-3401, 2006 WL 799187, at *6 (7th Cir. Mar. 30, 2006) ("[Patel's] case is not the same as *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999) * * *. There, the applicable law had changed during the period of delay and we found 'crucial significance' in the petitioner's diligent pursuit of relief."); *Morales-Ramirez* v. *Reno*, 209 F.3d 977, 983 (7th Cir. 2000) ("during the period of his incarceration, Morales-Ramirez made no effort, unlike the petitioner in *Singh*, to apply for discretionary waiver under § 212(c)"); see also *Clavis* v. *Ashcroft*, 281 F. Supp. 2d 490, 497 (E.D.N.Y. 2003) ("petitioner makes no allegation that he sought to have his case decided swiftly, a fact the Seventh Circuit held to be 'of crucial significance' in *Singh*"); cf. *Barker* v. *Wingo*, 407 U.S. 514, 531-532 (1972) (failure to assert right to speedy trial important factor in finding no violation of right). Those decisions make clear that, on facts like those present here, an alien in the Seventh Circuit would be treated no differently than an alien in the Sixth Circuit.

2. Petitioner also contends (Pet. 18-25) that, despite the fact that he served more than five years in prison, he should be deemed to have served less than five years in prison for purposes of determining his eligibility for Sec-

tion 212(c) relief, because, after his release from prison, his sentence was reduced from 5 to 20 years to 2 to 20 years. As with the first issue, the court of appeals correctly held otherwise, and its decision does not conflict with any decision of any other court. Further review is therefore unwarranted.

a. The court of appeals applied the principle that "[d]etermining whether imprisonment has made an alien ineligible for § 212(c) relief 'turns not on the sentence imposed but on the period of actual incarceration.'" Pet. App. 10a (quoting *United States* v. *Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001)). Petitioner does not appear to challenge that principle as a general matter. Instead, he contends that it does not apply when a sentence is later reduced to a term shorter than the time actually served. Even if that contention is correct, it does not benefit petitioner.

Contrary to his contention, petitioner was not "ultimately * * * sentenced to a term of imprisonment of less than five (5) years." Pet. 18. Petitioner's ultimate sentence was 2 to 20 years of imprisonment. Pet. App. 4a. Because, as the court of appeals recognized, "[p]arole is discretionary in Michigan," an indeterminate sentence of 2 to 20 years is not a sentence of less than five years. *Id.* at 11a (citing Mich. Comp. Laws Ann. § 791.234(9) (West 2004)). Indeed, petitioner "acknowledges that it is uncertain how long he would have served in prison" if his sentence had never been increased from 2 to 20 years to 5 to 20 years. Pet. 20 n.11.

b. Petitioner contends (Pet. 19-20, 22-24) that the court of appeals' decision on this point conflicts with decisions of a number of district courts. That contention would be irrelevant even if it were correct. See Sup. Ct. R. 10(a). And it is not correct.

In the case on which petitioner principally relies, *Mandarino* v. *Ashcroft*, 318 F. Supp. 2d 13 (D. Conn. 2003), the alien was sentenced to nine years of imprisonment, he served more than five years, and his sentence was later reduced to four years and 360 days. *Id.* at 16. The court held that the later sentence was "the relevant sentence for purposes of determining eligibility for waiver." *Id.* at 18. Unlike the four-year-and-360-day sentence in *Mandarino*, the 2-to-20-year sentence ultimately imposed here was not less than five years.

In the other cases on which petitioner relies, the district court concluded that the period of incarceration is to be measured at the time the alien initially seeks Section 212(c) relief, see *Greenidge* v. *INS*, 204 F. Supp. 2d 594, 597-600 (S.D.N.Y. 2001), or at the time the BIA enters a final order of deportation, see *Archibald* v. *INS*, No. CIV.A. 02-0722, 2002 WL 1434391, at *6 (E.D. Pa. July 1, 2002). In this case, petitioner had served more than five years at the time he initially sought Section 212(c) relief—and, *a fortiori*, at the time the final order of deportation was entered. Pet. App. 4a-5a, 11a n.7.[5]

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[5] *Edwards* v. *INS*, 393 F.3d 299 (2d Cir. 2004), which petitioner also cites (Pet. 19), is distinguishable on the same ground. See Pet. App. 11a n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

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